Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the good faith meeting competition defense of Section 2(b) of the Robinson-Patman Act is available to a firm that adopts a market-wide pricing system, as opposed to customer-by-customer prices, in response to the lower prices established by its competitors?

2. Whether the court of appeals erred in applying the competitive injury test of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), where there was no evidence either of seller predation or of systematic preference to large buyers, and where the evidence showed that the plaintiff lost sales because the defendant supplier was a dying regional brewer that lost sales in all of its markets?

3. Whether, in light of this Court's rejection of the automatic damages theory in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 101 S. Ct. 1923, 1926-27 (1981), the court of appeals erred in finding antitrust injury based on purported absorption of the price difference and loss of sales volume, where there was no evidence that the plaintiff ever set its prices in response to those of the allegedly favored purchaser, and there was no evidence that its loss of sales was caused by the disputed price difference?

4. Whether the lower court erred in holding, in a pendent state claim, that there had been an overcharge for state excise taxes?

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Falls City Industries, Inc. ("Falls City") petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 15, 1981.

OPINIONS BELOW

The opinion of the court of appeals is reported at 654 F.2d 1224 (7th Cir. 1981). The opinion of the district court is reported at 1980-2 Trade Cas. ¶ 63,357 (S.D. Ind. 1980). Copies of the court of appeals and district court opinions are reprinted in the Appendix.[1]

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[1] The Appendix to this petition is cited as "App." Trial transcript passages are cited as "Tr." Plaintiff's trial exhibits are cited as "PX"; defendant's trial exhibits are cited as "DX"; and defendant's proposed post-trial findings of fact and conclusions of law are cited as "DPF." Petitioner's Appendix in the court of appeals is cited as "CA App."

JURISDICTION

The court of appeals entered judgment on July 15, 1981. Falls City filed a timely petition for rehearing and suggestion for rehearing *en banc* which was denied on September 29, 1981.[2] On December 22, 1981, Justice Stevens extended the time to petition for certiorari to and including January 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13, are as follows:

> § 2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .
>
> (b). Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

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[2] Three of the six active judges of the Seventh Circuit voted to grant the petition for rehearing *en banc*, and Senior Judge Swygert, who dissented from the panel opinion, voted to grant the petition for rehearing.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

> § 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a claim by Vanco Beverage, Inc. ("Vanco"), a beer distributor in Evansville, Indiana, that Falls City Industries, Inc. ("Falls City"), a now-defunct regional brewer, violated the Robinson-Patman Act by charging higher prices for beer sold to its Indiana wholesalers than it charged beer wholesalers in Kentucky, including Dawson Springs, Inc. ("Dawson Springs"), a distributor in Henderson, Kentucky, approximately ten miles from Evansville. Falls City did not deny the alleged price difference but contended that Vanco had not proved the price difference caused the requisite injury to competition; that, in any event, it had a complete defense since its lower Kentucky prices were necessary to meet competition in that state; and that Vanco failed to prove "antitrust injury" to its business as required under this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *J. Truett Payne Co. v. Chrysler Motors Corp.*, 101 S. Ct. 1923 (1981).

B. The Factual Setting

It is undisputed that the Indiana-Kentucky price difference arose because Falls City was following the different prices set by leading brewers in Indiana and Kentucky. (Tr. 935). Those prices differed because state

laws prohibiting competition from out-of-state wholesalers[3] have caused each state to develop its own distinct structure of wholesale beer prices. Wholesale beer prices are higher in Indiana than in Kentucky, and the brewers' f.o.b. prices to Indiana wholesalers are correspondingly higher.[4] (DX 54, App. 59a; DX 62, App. 60a; *compare* DPF 32 *with* DPF 33, App. 63a-64a; DX 14, CA App. A-64—A-67). This historic and industry-wide pricing practice is at the core of Vanco's complaint.

Because state laws prohibited Vanco and Dawson Springs from selling in each other's territories, Vanco's claim necessarily rested on allegations that Evansville, Indiana and Henderson, Kentucky comprised a single retail beer market and that the brewery price difference was passed on by wholesalers and retailers to the ultimate consumers, causing indirect competitive harm to Vanco. The evidence showed that Evansville wholesale prices were different from, and moved independently of, wholesale prices in Henderson, Kentucky (*compare* DX 54, App. 59a *with* DX 62, App. 60a); that Vanco identified its competition as the Evansville distributors of other brands and set its prices to meet their "established price" (DX 66, CA App. A-88—A-90); and that Vanco never adjusted its prices to meet Henderson price competition. (Tr. 722-23). Nevertheless, the district court found there was a single Evansville-Henderson retail beer market. (App. 28a-29a).

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[3] *See* Ind. Code Ann. § 7.1-3-3-5 (Burns Supp. 1981); Ky. Rev. Stat. § 243.280 (Supp. 1980).

[4] Indiana law (Ind. Code Ann. § 7.1-5-5-7 (Burns 1978)) requires brewers to sell to all Indiana wholesalers at the same price. Consequently, Falls City could have equalized its Evansville and Henderson prices only by reducing its price to *all* Indiana wholesalers or, alternatively, by charging a noncompetitively high price in Henderson, Kentucky.

The growing domination of large national brewers since World War II has caused a massive elimination of small regional brewers. (Tr. 920-24). Where in 1946 there were approximately 450 brewers in the United States, by 1979 there were fewer than 40 brewers, with approximately 70 percent of all beer sold in the United States being manufactured by only five brewers. (*Id.*). Falls City, like other small brewers, sustained fatal sales declines during the relevant period (1972-1977), and in November 1978, terminated its brewing operations. (Tr. 922-24, DX 23).

Leading national brands, such as Miller, Stroh's and Anheuser-Busch, were also sold by the brewers to wholesalers at higher prices in Indiana than in Kentucky. (DX 14, CA App. A-64—A-67; DPF 29, App. 62a). Nevertheless, each grew rapidly in Evansville. Thus, from 1972 to 1977, Miller's Evansville sales increased by nearly 520 percent, Stroh's by more than 150 percent, and Anheuser-Busch's by approximately 70 percent. (DX 10, App. 57a).

Over the same period, Falls City's Evansville sales fell by 57.6 percent.[5] That decline, however, was no greater than Falls City's decline in central Indiana markets remote from the Kentucky border. (DX 6, App. 55a; DX 7, CA App. A-55). Thus, Falls City sales fell by 60.87 percent in Indianapolis, 61.10 percent in Plainfield, 64.21 percent in Lafayette, and 66.18 percent in Muncie; and for a group of thirteen contiguous central Indiana counties as a whole, Falls City's sales declined by 60.7 per-

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[5] DX 9, App. 56a; DX 10, App. 57a. Falls City's sharpest decline occurred in 1973 when its sales fell by more than 80,000 cases from the 1972 levels. (*See* DX 9, App. 56a). The difference in the Falls City Indiana and Kentucky f.o.b. prices was exactly the same in 1973 as in 1972 (DX 15, CA App. A-61), and contemporaneous documents written by Vanco's officers did not cite the price difference as even a partial cause of the decline. (DX 1, CA App. A-41—A-52).

cent. (DX 6, App. 55a). Falls City's Evansville decline was not matched by any corresponding increase in Henderson, Kentucky. In fact, Dawson Springs also sustained a substantial sales loss from 1972 to 1977. (DX 51, App. 54a). The district court found that there was "no direct correlation between plaintiff's losses and the [Falls City] sales" of Dawson Springs, but surmised that Vanco "may have" lost sales to other brands of beer and to distributors of Falls City "in neighboring areas of Kentucky." (App. 35a).[6]

Falls City relied on reports from sales representatives, customers and public agencies to keep informed of, and to stay competitive with, the market prices in Indiana and Kentucky. (Tr. 935-36, 951-52; DX 28; PX 231). Its Indiana prices were approximately equal to those of its principal Indiana competitors, Pabst and Stroh's; its Kentucky prices closely approximated those of Pabst and Stroh's, who were also its main rivals in Kentucky. (DPF 31-33, App. 62a-64a). It is not disputed that Falls City's Indiana prices would have been noncompetitive with the lower market prices in Henderson, Kentucky. (*Compare* DX 54, App. 59a *with* DX 62, App. 60a; *see* DPF 35, App. 65a).

Vanco was a distributor of Falls City beer since 1953 and also sold Anheuser-Busch, Heileman and certain other brands. Vanco's sales of the successful national beers increased as its Falls City sales eroded over the 1972 to 1977 period. By 1977, Vanco was the largest beer distributor in Evansville (DX 11, App. 58a), and despite its decline in Falls City sales, Vanco's total beer

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[6] The most plausible explanation for Falls City's sales loss in Evansville from 1972 to 1977 was the large growth in national brand sales. Thus, while Falls City sustained a sales loss in Evansville of approximately 207,000 cases (DX 5, CA App. A-53), Miller, Stroh's and Anheuser-Busch had an aggregate gain in excess of half a million cases. (DX 9, App. 56a).

sales in 1978 were 28 percent greater than in 1972. (PX 95; DX 25).

C. Proceedings Below

This action was filed by Vanco in December 1976, charging that Falls City had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and Section 1 of the Sherman Act, 15 U.S.C. § 1. After trial to the court, the district court found that the difference between Falls City's Indiana and Kentucky prices violated the Robinson-Patman Act (App. 47a), and accepting the now-repudiated "automatic damages" theory, the court awarded Vanco damages equal to the full amount of the price differential ($575,293.79 before trebling). (App. 47a-48a). Finding "no evidence that [Falls City] set its prices . . . pursuant to an agreement with any other brewer of beer" (App. 45a), the court rejected Vanco's Sherman Act charge (App. 45a-46a), and Vanco did not appeal. Finally, the court found for Vanco on a pendent state claim that Falls City had "overcharge[d]" Vanco for excise tax payments. (App. 27a-28a, 52a).

On appeal, the Court of Appeals for the Seventh Circuit affirmed (Judge Swygert dissenting), except as to the amount of Robinson-Patman damages, and the case was remanded for reassessment of damages in light of this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 101 S. Ct. 1923 (1981). (App. 12a). In finding that the brewery price difference materially caused the decline in Vanco's Falls City sales, the court of appeals, like the district court, disregarded the fact that major national brand sales had increased greatly in Evansville, and that Vanco's Falls City sales loss was no greater than was sustained by Falls City distributors in central Indiana. (App. 7a-8a, 10a-11a). Relying on this Court's assertion in *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), that Section 2(b) "places

emphasis on individual situations, rather than upon a general system of competition," the court rejected Falls City's meeting competition defense. (App. 9a-10a).

Judge Swygert, dissenting, relied on this Court's admonition in *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978), that the Section 2(b) defense is to be " 'a flexible and pragmatic' " concept and on the holding of the Court of Appeals for the Fifth Circuit in *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966). He concluded that Section 2(b) is not limited to meeting individual situations (App. 16a), that under *Callaway Mills* "adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition" (App. 17a), and that Falls City's lower Kentucky prices were necessary "to meet the competition there." (*Id.*).[7]

An evenly divided court denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

Supreme Court review of this Robinson-Patman case is required for the following reasons: *First*, to resolve a direct conflict between the decision below and decisions of the Fifth and Ninth Circuits on the important question whether the Section 2(b) meeting competition defense may be used where system-wide price responses are involved; *second*, to make clear that *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), does not create a presumption of competitive injury where, as here, there is no evidence of seller predation or systematic favoritism of large buyers; and, *third*, to clarify, in light of this Court's repudiation of the automatic damages concept in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 101 S. Ct. 1923 (1981), the nature of plaintiff's obligation to prove that

[7] Judge Swygert also dissented from the majority's affirmance of the district court's determination that Falls City had overcharged Vanco for state excise taxes. (App. 17a n.6).

it sustained "antitrust injury" as a result of discriminatory pricing. As we show, the court of appeals decision is inconsistent with the teachings of this Court in *Payne* and conflicts with court of appeals decisions rejecting the amount of the price difference as automatic proof of injury and damages under Section 4 of the Clayton Act.

These questions are of particular and immediate significance to the brewing industry, which is subject to widespread state regulation creating competitively separate state wholesale markets.[8] More generally, they are important to all judges, lawyers and businessmen concerned with rational and procompetitive application of the Robinson-Patman Act.

1. The failure of the Federal Trade Commission and some courts of appeals to give Section 2(b) a " 'flexible and pragmatic' " interpretation[9] where system-wide responses are involved has led to scholarly criticism[10] and

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[8] The brewers' problem is particularly severe where, as here, the state mandates uniform beer prices to all wholesalers. Where such laws or regulations exist, the brewer can equalize prices across state borders only by lowering the price throughout one state or by setting a noncompetitively high price in the cross-border market. At least twelve states, including Indiana, have such uniform price requirements: Conn. Gen. Stat. Ann. § 30-63 (West Supp. 1981); Idaho Code § 23-1033A (1977); Ind. Code Ann. § 7.1-5-5-7 (Burns 1978); Kan. Stat. Ann. § 41-1101 (Supp. 1980); Md. Ann. Code art. 2B, § 108 (1981); Mass. Gen. Laws Ann. ch. 138, § 25A (West 1974); N.J. Administrative Code, N.J.A.C. 13:2-24.1 (Supp. 1980); N.M. Stat. Ann. § 60-8A-8 (Supp. 1981); N.D. Cent. Code § 5-04-12 (Supp. 1981); Okla. Stat. Ann. tit. 37, § 533 (West Supp. 1980); Or. Administrative Rules 845-10-210 (1981); Wash. Administrative Code, W.A.C. 314-20-105 (1977).

[9] United States v. United States Gypsum Co., 438 U.S. 422, 454 (1978), *quoting* Continental Baking Co., 63 F.T.C. 2071, 2163 (1963).

[10] As early as 1962, a leading commentator noted that the legality of "systematic" as opposed to "individual" pricing under Section

a direct conflict among the circuits.[11] Focusing on this conflict, a Department of Justice report on the Robinson-Patman Act notes that "[r]isk . . . attends a seller's decision to meet competition by adopting an entire pricing system for that purpose rather than by specific competitive price cuts."[12] The Report adds that the Commission has taken the position "that a uniform change in the seller's total pricing system will not satisfy the meeting competition defense" and points out that there "is a split authority among the various circuits." (*Id.*). The decision below exemplifies and intensifies the "split authority" referred to by the Department of Justice.

The Fifth and Ninth Circuits both have held that the meeting competition defense is available to a firm that adopts a market-wide pricing system as opposed to individual customer-by-customer prices. In *Callaway Mills*

2(b) was an issue that awaited "careful analysis and harmonization by" this Court. F. Rowe, Price Discrimination Under the Robinson-Patman Act 233-34 (1962). More recently, a monograph of the American Bar Association Section of Antitrust Law noted that among "[r]emaining significant questions" regarding the Section 2(b) meeting competition defense is: "Should the defense be available in response to pricing systems as well as individual prices?" ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, vol. I at 118 (1980) ["ABA Monograph"]. For discussion of the relevant policy issues, *see* ABA Monograph at 126-128.

[11] *Compare* Callaway Mills Co. v. FTC, 362 F.2d 435, 442 (5th Cir. 1966), and William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917, 950 (9th Cir. 1981), which approve system-wide price responses, *with* Standard Motor Products, Inc. v. FTC, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) ("a lowered price is within Section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system"). *See* Knoll Int'l, Inc., [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 19,768 (F.T.C. August 10, 1971) (advisory opinion).

[12] United States Department of Justice, Report on the Robinson-Patman Act 24 (1977) ["Department of Justice Report"].

Co. v. FTC, 362 F.2d 435 (5th Cir. 1966), the Fifth Circuit upheld defendants' use of an annual volume discount system generally employed by firms in the industry. Holding that system-wide responses are not "condemned per se," the Fifth Circuit ruled that "[i]t is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned." [13] *Id.* at 442. Similarly, the Ninth Circuit has held that Section 2(b) permits a firm to meet competition by reducing prices over an entire geographic marketing area. Relying on *Callaway Mills*, it held that Section 2(b) allows price reductions " 'which are granted not only to particular customers,' " but also " 'which respond in a given area by blanket price reductions co-extensive with the price competition to be met.' " *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 652 F.2d 917, 950 (9th Cir. 1981) (citations omitted). Whether a firm adopts a regional pricing system as in *Inglis*, or a system-wide volume discount as in *Callaway Mills*, "the touchstone must be the good faith and reasonableness of the defendant's belief." *Inglis*, 652 F.2d at 950.

The decision of the majority below is in direct conflict with the decisions of the Fifth and Ninth Circuits. Relying exclusively on *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), the court held that Section 2(b) " 'places emphasis on individual situations, rather than upon a general system of competition' " and does not permit price differences that result "merely from the adoption of a competitor's discriminatory pric-

[13] Both the Department of Justice and the ABA Section of Antitrust Law have indicated approval of the approach taken by the Fifth Circuit in *Callaway Mills*. Department of Justice Report, *supra* n.12, at 24-25; ABA Monograph, *supra* n.10, at 126-28. *See* Report of the White House Task Force on Antitrust Policy, 411 Antitrust & Trade Reg. Rep. (BNA) pt. 2 at C-16 (May 27, 1969), *reprinted in* 1 J. Reprints Antitrust L. & Econ. 633, 768-69 (1969) ["Neal Report"].

ing structure." (App. 9a). Consequently, despite uncontroverted evidence that Falls City's prices closely approximated both the noncollusive prices established by competition in the Indiana market [14] and the lower prices prevailing in Kentucky (*see* App. 15a-17a), the court held that Falls City had failed to prove "that its discriminatory pricing was a good faith effort to defend against competitors." (App. 10a). The court's rigid and doctrinaire application of *Staley* leaves Falls City and others similarly situated with an impossible choice: they must either price substantially below the established market price throughout Indiana [15] or else price noncompetitively in Kentucky.

As Judge Swygert's dissent makes clear, Section 2(b) avoids that dilemma, for under *Callaway Mills* "the adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition." (App. 17a). In fact, as stated by Judge Swygert, "the prices charged by all brewers was [sic] lower in Kentucky" and "Falls City was therefore forced to charge a lower price in Kentucky to meet the competition there." (*Id.*). Unless Section 2(b) can be used only to meet competition on a customer-by-customer basis, Falls City's lower

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[14] As noted, the district court found "no evidence that [Falls City] set its prices . . . pursuant to an agreement with any other brewer of beer," and dismissed Vanco's Sherman Act charge. (App. 45a-46a, 52a).

[15] The laws of Indiana and at least eleven other states (*see* n.8, *supra*) require brewers to sell to all wholesalers in the state at a uniform price. Ind. Code Ann. § 7.1-5-5-7 (Burns 1978). As Judge Swygert correctly pointed out, relying on this Court's decision in Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951), " 'There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to *all* its customers to match the price offered to *one* or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs.' " (App. 16a-17a n.4; Judge Swygert's emphasis).

Kentucky price is, as Judge Swygert noted, "the essence of a section 2(b) defense." (*Id.*).

The majority interpretation of Section 2(b) is totally at odds with the broader competition goals of the Sherman Act [16] and in conflict with *Callaway Mills* and *Inglis*. Resolution of this conflict is essential in order to eliminate the risk and uncertainty that still attend a seller's decision to meet competition by adopting "an entire pricing system . . . rather than by specific competitive price cuts." Department of Justice Report, *supra* n.12, at 24.

2. This case presents a striking example of irrational Robinson-Patman enforcement caused by a mechanical application of the competitive injury test of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Review by this Court is particularly timely and appropriate in light of the mounting criticism of *Morton Salt* and its progeny [17]

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[16] Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 450 (1978); Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951).

[17] The Department of Justice has criticized the *Morton Salt* test for "creat[ing] a virtual presumption of illegality" once a disparity in price is shown. Department of Justice Report, *supra* n.12, at 9-11. Not only is the requisite injury "proved by easily drawn inferences," but also it is extremely difficult to rebut. *Id.* at 10-12. Hence, "[t]he total effect of the majority of the secondary line cases is to create a virtually irrebuttable presumption that any price discrimination is injurious to competition." *Id.* at 14. To remedy this problem, the Department has proposed that only two types of secondary line discrimination be prohibited: (1) discrimination "which is part of a pattern which systematically favors larger recipients in the relevant market over their smaller competitors"; and (2) "a cost differential of such a nature that it clearly threatens to eliminate from the relevant line of commerce or market one or more competitively significant rivals." *Id.* at 290-91.

Similarly, the ABA Monograph records the substantial and continuing criticism of the *Morton Salt* rule. ABA Monograph, *supra* n.10, at 97-104. The Monograph notes that in *Morton Salt*, this Court had observed that " '[t]he legislative history of the Robinson-

and because the lower courts have here imposed harsh antitrust liability on a weak and dying company guilty of nothing more than following the market prices set by its leading competitors.

In holding that Vanco had proved the requisite competitive injury under Section 2(a), the court of appeals noted simply that such injury "is established where the price differential is 'sufficient to influence retail prices,'" citing *Morton Salt* and *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972). (App. 7a-8a). It held this standard was satisfied because "the relevant retail beer prices in Evansville were $.50 to $1.50 higher per case than in Henderson County during the relevant period," and because "Vanco over the same period suffered a sharp decline in Falls City beer sales." (App. 8a). Neither of these findings rests upon the "realistic appraisals of relevant competitive facts" mandated by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963).

First, both the district court and the court of appeals totally disregarded the legal significance of intervening

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Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.'" *Id.* at 98, citing 334 U.S. at 42-43. Given this legislative background, the Monograph states that "[s]ome commentators have indicated that limiting the applicability of the *Morton Salt* 'inference of injury' rule to systematic discriminations favoring large buyers would reorient the Act to its original objective in the secondary line context" (*id.* at 103); and the Monograph cites Professor Edwards' criticism that "proceedings against small concerns directed against injuries to competition that had nothing to do with the big buyer or the predatory seller have given the Act 'an unnecessarily harassing effect on business conduct' and diverted the Commission from the 'substantial problems of power, which were the principal concern of the legislation.'" *Id.* Finally, the Neal Report proposed legislation that would restrict the holding of *Morton Salt* "to its particular facts—a systematic pattern of price discrimination favoring large buyers over small." Neal Report, *supra* n.13, at C-9.

wholesale and retail pricing decisions entirely beyond Falls City's control which played a pivotal role in determining relative retail prices in Evansville and Henderson.[18] *Cf. Purolator Products, Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); *see* F. Rowe, Price Discrimination Under the Robinson-Patman Act 203 (1962).

Moreover, in basing their findings of competitive injury on Vanco's decline in Falls City beer sales, the lower courts totally ignored undisputed evidence relating to the rising domination of the major brewers and the resulting demise of small regional concerns like Falls City. More specifically, the courts failed to analyze and consider the following uncontroverted competitive facts:

First, major brands, such as Miller, Stroh's and Anheuser-Busch, grew rapidly in Evansville although subject to the same brewery price differential as Falls City. (DX 9, App. 56a; DX 10, App. 57a). The success of these brands demonstrates the competitive insignificance of the price difference and provides a ready explanation for Vanco's Falls City decline.[19]

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[18] Thus, the lower court's finding of an alleged $.50 to $1.50 retail price difference (App. 8a) was based on testimony that such difference existed "at one time." (Tr. 219-20). That time was the summer of 1974 (Tr. 224-25, 229), when Vanco and other Evansville wholesalers substantially raised their wholesale prices while the Kentucky wholesalers, faced ultimately with virtually the same amount of increase in brewery f.o.b. prices, did not. (DX 54, App. 59a; DX 62, App. 60a). As a consequence, Vanco increased its gross profit margins on two typical packages from $1.45 and $1.51 to $1.70 and $1.75 per case, while Dawson Springs allowed its margins to shrink from $1.14 and $1.38 to only $.80 and $1.05 per case. (DX 54, App. 59a; DX 62, App. 60a). On the other hand, a documented retail price survey established that in December 1976, when wholesalers' margins were more nearly in line, retail beer prices in Henderson and Evansville were virtually identical. (DX 14, CA App. A-64—A-67).

[19] Since Dawson Springs also lost sales (DX 51, App. 54a), it was plainly this massive growth of the major brands, not cross-over purchases of Falls City beer in Kentucky, that caused Vanco's sales loss.

Second, while Vanco's Falls City sales fell by approximately 58 percent over the relevant period (DX 51, App. 54a), Falls City's sales also declined at a similar rate in such central Indiana markets as Indianapolis, Lafayette and Muncie, and in a block of thirteen contiguous central Indiana counties. (DX 6, App. 55a; DX 7, CA App. A-55).

Third, Vanco experienced its greatest Falls City sales decline in 1973. Since the brewery price difference was exactly the same in 1973 as in 1972 (DX 15, CA App. A-61), the loss must have been caused by other factors. This logical inference is confirmed by Vanco's contemporaneous attribution of the decline entirely to an influx of highly competitive "price beers," a wildcat strike, and a decline in Falls City's "image". (DX 1, CA App. A-42—A-45). Moreover, in 1973, Vanco increased its Anheuser-Busch sales by more than 120,000 cases, although Anheuser-Busch was subject to the same Indiana-Kentucky price differential. (PX 95).

Thus, review by this Court is needed to make clear both that *Morton Salt's* competitive injury test should not be mechanically applied where, as here, there is neither large buyer preference nor seller predation, and that the necessary finding of competitive injury must rest on realistic analysis of the competitive facts.

3. This case also presents important questions concerning proof of antitrust injury in price discrimination cases. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 101 S. Ct. 1923, 1926 (1981), this Court held that a Robinson-Patman plaintiff is not entitled to "so-called 'automatic damages' in the amount of the price discrimination"; however, while stressing that "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4" of the Clayton Act (*id.* at 1926-27), the Court found it unnecessary to consider the question of the quantum of proof

required to establish the fact of injury in a secondary line case. (*Id.* at 1928-29 n.4).

In the leading case of *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), Judge Hand, relying on Justice Cardozo's opinion in *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933), drew a critical distinction between an overcharge, which is injurious in and of itself, and a discrimination, which may or may not be actionable, depending upon whether it causes competitive injury. (240 F.2d at 460). Judge Hand ruled that injury results only if price discrimination forces a firm (1) to sell at a lowered price to meet the price of the favored firm, or causes it (2) to lose profits due to diverted sales. While Judge Hand's analysis in *Enterprise* has been widely followed,[20] it was neither adopted nor rejected by this Court in *Payne*.

The majority below gave lip service to the importance of "the requisite causal connection" between price discrimination and injury (App. 10a), but it cavalierly accepted, with only cursory discussion, findings of the district court that were either based on the now-repudiated automatic damages theory or were entirely without factual basis.[21]

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[20] *See, e.g.*, Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17 (1st Cir. 1981); Interstate Cigar Co. v. Sterling Drug, Inc., 655 F.2d 29 (2d Cir. 1981); Uniroyal, Inc. v. Jetco Auto Service, Inc., 461 F. Supp. 350 (S.D.N.Y. 1978); Hasbrouck v. Texaco, Inc., 1980-2 Trade Cas. ¶ 63,343 (E.D. Wash. 1980), *rev'd on other grounds*, 1981-2 Trade Cas. ¶ 64,401 (9th Cir. 1981).

[21] In sharp contrast to the Seventh Circuit, the Ninth Circuit recently remanded a price discrimination case for a redetermination of both the fact and the amount of damages in a case that had been tried on the automatic damages theory. Stressing the close relationship between "proof of injury for liability purposes" and the amount of damages under Section 4 of the Clayton Act, the Ninth Circuit rejected the notion that "the determination of liability is fairly separable from the calculation of damages in a private anti-

First, the court of appeals held that Vanco had proved injury because it "was forced to absorb some of the price differential in order to stay competitive" and it "thereby narrowed its profit margin." *Id.* By assuming that "absorption" proves antitrust injury, the Seventh Circuit adopted a standard in conflict both with this Court's repudiation of automatic damages in *Payne* and with the *Enterprise* line of cases. "Absorption" of a price differential is irrelevant absent evidence that plaintiff's wholesale prices were set in response to competitive actions by the favored purchasers. Here, there was no evidence that Vanco ever geared its pricing strategy to wholesale prices in Kentucky; to the contrary, it admittedly tried to stay competitive only with the other Evansville distributors. (DX 66, CA App. A-88—A-90). Hence, there was no evidence that Vanco either cut its price or refrained from making a price increase because of Henderson price competition. In these circumstances, "absorption" is simply automatic damages in another guise, and the court's reliance on it was wrong as a matter of law.

Second, the court of appeals found that Vanco was injured because it "was forced to pass some of the price differential on to its customers" and "in turn suffered a loss in sales volume." (App. 10a). But Vanco never proved a causal relation between its loss of Falls City sales and the price differential. As noted earlier, that price differential was industry-wide, yet it had no adverse effect on the Evansville wholesalers who distributed the successful major brands, including Vanco itself (DX 11, App. 58a); and, as also shown above, sales of Falls City declined at roughly the same rate as those of Vanco in major central Indiana counties far removed from the

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trust action such as this one." Accordingly, it remanded the case for a new trial on "both the issues of liability and the amount of damages." Hasbrouck v. Texaco, Inc., 1981-2 Trade Cas. ¶ 64,401 (9th Cir. 1981) at 74,935-36 (citation omitted).

Kentucky border. (DX 6, App. 55a). Had the court of appeals done anything more than rubberstamp the district court's findings, it would have been apparent that Vanco did not lose Falls City sales " 'by reason of anything forbidden in the antitrust laws.' " *Brunswick*, 429 U.S. at 488.

The Seventh Circuit's uncritical approach to the injury question highlights the need for this Court to make clear that, after *Payne*, a Robinson-Patman plaintiff must prove more than price discrimination in order to establish that it sustained antitrust injury.

4. We respectfully urge that this Court, in the exercise of its supervisory jurisdiction, also reverse the patently erroneous holding of the court of appeals on the pendent state claim. In holding that Falls City had "overcharged" Vanco for state excise tax (App. 12a-13a), the court of appeals reached a result that, as Judge Swygert noted, only could have been reached by "placing technicality over reality." (App. 17a n.6). If left unchanged, the ruling would unjustly enrich a plaintiff who actually conceded the factual error of his claim at trial. The excise tax claim arose due to a misapprehension by Vanco's principal that there was a disparity between the f.o.b. price announced by Falls City and the invoiced f.o.b. price he actually paid. But Vanco's principal ultimately conceded, as he had to, that he was always "paying the FOB price as shown on the price [announcement] sheet." (Tr. 734, CA App. A-83). Thus, as Judge Swygert correctly noted, Vanco "always paid the price it expected to pay—the announced F.O.B. price at Falls City's loading docks," and there was no "overcharge" or deception on Falls City's part. (App. 17a n.6).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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January 7, 1982

Appendix

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 80-1709

VANCO BEVERAGES, INC.,
Plaintiff-Appellee,

v.

FALLS CITY INDUSTRIES, INC.,
Defendant-Appellant.

Argued Dec. 10, 1980

Decided July 15, 1981

Before CUMMINGS, Chief Judge, SWYGERT, Senior Circuit Judge, and BROWN, Senior District Judge.*

CUMMINGS, Chief Judge.

Defendant Falls City Industries, Inc. (Falls City) appeals from a judgment awarding plaintiff Vanco Beverages, Inc. (Vanco) $1,725,881.37 in treble damages for injury resulting from Falls City's discriminatory pricing of beer in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)) and $17,251.27 for monies had and received by Falls City as a result of overcharging Vanco for state excise taxes. We affirm except as to the amount of damages awarded under Section 2(a).

I. *Introduction*

Falls City formerly operated a brewery in Louisville, Kentucky, that marketed beer under the names "Falls City Beer" and "Drummond Bros. Preferred Beer."

* The Honorable Wesley E. Brown, Senior District Judge of the District of Kansas, is sitting by designation.

Vanco, located in Evansville, Indiana, was formerly the sole wholesale distributor of Falls City beer in Vanderburgh County, Indiana, which includes the city of Evansville. Vanderburgh County is located just north of Henderson County, Kentucky, with their common border running mostly along the Ohio River. Beer retailers in both states are required by state law to purchase beer for resale only from authorized distributors in their respective states.[1] Indiana law also requires that each brewer sell at a uniform price to all its Indiana wholesale distributors.[2]

In November 1977, Vanco filed its first amended complaint in this lawsuit.[3] That complaint, as subsequently amended and supplemented, alleged that Falls City sold a substantial quantity of beer brewed in Kentucky to wholesale distributors, including Vanco, located in Indiana; that beer retailers in Henderson County, Kentucky, were in competition with beer retailers in Vanco's distribution area; that from July 1, 1972, to November 30, 1978, Falls City sold its beer to Kentucky wholesalers at prices lower than those granted to Vanco; that this discriminatory pricing policy resulted in higher retail prices in Indiana than in Kentucky; and that as a consequence many Indiana consumers purchased Falls City beer from Kentucky retailers instead of Indiana retailers, thereby causing Indiana retailers to purchase less Falls City beer from Vanco.

Count I alleged that from July 1, 1972, to November 30, 1978,[4] Falls City and various unnamed beer wholesalers in Kentucky conspired to restrain trade in

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[1] Ind. Code Ann. § 7.1-3-3-5 (Burns 1979); Ky. Rev. Stat. § 243, 244 (1970).

[2] Ind. Code Ann. § 7.1-5-5-7 (Burns 1979).

[3] The original complaint was filed on December 28, 1976.

[4] November 30, 1978, is the date on which Falls City abandoned beer-making in favor of other lines of business.

violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and conspired to monopolize the sale of Falls City beer in the relevant market area in violation of Section 2 of the Sherman Act (15 U.S.C. § 2), thereby damaging Vanco in an indeterminate amount.[5] Count II alleged that Falls City had engaged in discriminatory pricing in violation of Section 2(a) of the Robinson-Patman Act, thereby causing Vanco to pay in excess of $500,000 more for Falls City beer than defendant's Kentucky wholesalers over the relevant six-year period for the same quantity and quality of beer. Count III, a pendent state law claim for money had and received, alleged that Falls City overcharged Vanco for Indiana excise taxes by an amount in excess of $17,000 and that Falls City did not pay these overcharges to the State of Indiana but retained them for its own use. Vanco sought treble damages under Counts I and II, return of the Indiana tax overcharges alleged in Count III, and injunctive relief to prevent Falls City from selling its products to Kentucky wholesalers at a lower price than it granted Vanco and from overcharging Vanco for state excise taxes.[6]

After a five-day bench trial in May 1979, the district court dismissed the Sherman Act claims in Count I for want of proof, but found in favor of Vanco on Counts II and III in the respective amounts of $575,293.79, before trebling under Section 4 of the Clayton Act (15 U.S.C. § 15), and $17,251.27 plus interest. No equitable relief was granted.[7] At the close of the trial, the district court called for briefs and for proposed findings of fact and conclusions of law. The last of these documents was

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[5] Vanco later asserted that its going-concern value had diminished by $766,000 and that Falls City had overcharged it by $565,000 as a result of the Sherman Act violations (App. A-4).

[6] Two additional counts against Falls City and Working Beverage, Inc., a competitor of Vanco's in Vanderburgh County, Indiana, were dismissed as moot by plaintiff before trial (App. A-1—A-27).

[7] Since Falls City was no longer in the brewery business (note 4 *supra*), equitable relief was, of course, unnecessary.

filed in January 1980. The court's amended findings of fact, conclusions of law and judgment, drawn from the parties' proposals and the court's own additions, were released on April 14, 1980, and are reported in CCH 1980-2 Trade Cases ¶ 63,357. This appeal followed.

II. *Elements of the Robinson-Patman Violation*

Section 2(a) of the Robinson-Patman Act provides in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." (15 U.S.C. § 13(a)).

In concluding that Falls City violated this provision, the district court relied on the following ultimate findings of fact: that from July 1, 1972, to November 30, 1978, Falls City sold beer to Vanco at f.o.b. prices approximately 10% to 30% higher than prices charged Dawson Springs Beverage Company, the Falls City distributor for Henderson County, Kentucky, and other Kentucky distributors; that the Evansville, Indiana, and Henderson, Kentucky, areas constitute a unified retail beer market; that Falls City's discriminatory pricing policy substantially lessened competition in the Evansville-Henderson market; and that Falls City could have sold to Vanco and Dawson Springs at the same price, but chose "to get a higher price in Indiana than in Kentucky."

Falls City concedes that it sold beer to Vanco and Dawson Springs at different prices, but challenges as "legally and factually erroneous" the district court's findings with respect to other elements necessary to establish a Section 2(a) violation. However, Vanco has carefully annotated those findings to 165 portions of the transcript of trial testimony and depositions as well as to exhibits of both parties (Supp.App. A-16—A-23). An examination of the annotated materials and the record generally has convinced us that the court's findings are not clearly erroneous and that the record supports its conclusion that Falls City violated Section 2(a).

A. Interstate Commerce

Falls City argues in a footnote in its principal brief that the interstate features of Section 2(a) were not satisfied. This argument is frivolous. Even Falls City's president, James F. Tate, admitted both in his deposition (at p. 16) and at trial (Supp.App. A-81) that his company sold beer in Indiana. Moreover, Falls City allocated Vanderburgh County, Indiana, to Vanco as its exclusive territory for the wholesale distribution of Falls City beer, paid Indiana excise taxes on the beer sold to Vanco and participated in Vanco's Indiana sales by the soliciting and servicing of Vanco's retail accounts there. Thus the sale of Falls City beer to Vanco was clearly "in commerce" within the meaning of Section 2(a). *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378; *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 S.Ct. 240, 95 L.Ed. 239. The facts that Falls City priced its beer f.o.b. Louisville and that all its distributors, including Vanco, picked up their beer at the brewery in Louisville do not, as Falls City suggests, make the sales to Vanco wholly intrastate.[8]

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[8] Falls City's reliance on *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), certiorari denied, 414 U.S. 1146, 94 S.Ct. 899, 39 L.Ed.2d 102, is misplaced. In that case, the plaintiff, its competitors and the defendant were all

B. Relevant Market

Falls City next argues that there is no unified Evansville-Henderson retail beer market and that the district court therefore erred in finding that Vanco and Dawson Springs, Falls City's Henderson County distributor, competed in the same market. However, the record is to the contrary insofar as their retail customers were concerned and that is sufficient under the Act.

As noted, Vanderburgh County, Indiana, and Henderson County, Kentucky, are separated for most of their common border only by the Ohio River. In addition, a portion of Henderson County lies on the Indiana side of the river contiguous to Evansville. The cities of Evansville and Henderson are diagonally across from each other on the river ten or fewer miles apart and are connected by a four-lane interstate highway. There is a massive flow of residents of Vanderburgh County to work in Henderson County and vice versa, and shopping centers and entertainment facilities in the area are patronized by residents of both counties. Consequently, the federal Department of Labor counts the two counties together for the purpose of labor statistics, and both areas are designated as one by the federal Department of Commerce. Moreover, many retail purveyors of beer and liquor are located along a Kentucky portion of the highway connecting Evansville and Henderson only a few miles from Evansville. This area, known as "The Strip," is frequented by both Indiana and Kentucky consumers. Finally, various witnesses testified that consumers in the area go to whichever county has the cheaper beer and liquor prices and that advertising is directed at residents of both areas as if they constituted one market. Thus the district court's finding that beer retailers in

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located in Illinois so that, although the defendant did make interstate sales, no interstate transaction was involved in the relevant market.

Vanderburgh County were in competition with those in Henderson County is not clearly erroneous.[9]

Section 2(a) by its terms bans price discrimination that tends to lessen competition not only among sellers (primary-line competition) but also among their "customers", and it is well settled that the statutory protection of "customers" extends to at least the fourth level of distribution. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647, 649, 89 S.Ct. 1871, 1874, 1875, 23 L.Ed.2d 599; see generally, Kintner, *A Robinson-Patman Primer* (2d ed. 1979) at 108-110.[10] Consequently, the fact that Vanco's customers were in competition with Dawson Springs' customers is sufficient to bring Falls City's discriminatory pricing within the ambit of Section 2(a) even though Vanco and Dawson Springs were themselves precluded by state law (note 1 *supra*) from competing for the same retail accounts.

C. Competitive Injury

Falls City also contends that the district court erred in finding the requisite competitive injury. Again, we disagree. Section 2(a) requires only proof that the price discrimination shown "create a reasonable probability of substantial injury to competition." *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972). It is well settled that such a showing is established where the price differential is "sufficient to influence retail prices." *Federal Trade Commission v.*

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[9] We note also that Evansville-Henderson has previously been recognized as a single market for dairy products. See *Dean Milk Company v. Federal Trade Commission*, 395 F.2d 696, 698 (7th Cir. 1968).

[10] The holding in *Perkins* was presaged by *Krug v. International Telephone & Telegraph Corp.*, 142 F.Supp. 230, 235-236 (D.N.J. 1956), on which Vanco relies. Falls City cites Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962) as authority that any market beyond secondary-line injury is not protected by Section 2(a), but the author's early interpretation ignores the statutory language and was rejected in *Perkins*.

Morton Salt Company, 334 U.S. 37, 49, 68 S.Ct. 822, 829, 92 L.Ed. 1196; *Bargain Car Wash*, *supra*, 466 F.2d at 1174. Here it is not disputed that Falls City over a six-year period charged Vanco prices varying from approximately 10% to 30% higher than it charged Dawson Springs and other Kentucky distributors. The record indicates that Vanco passed on some of this price differential, which is indisputably substantial, to its customers, that the relevant retail beer prices in Evansville were $.50 to $1.50 higher per case than in Henderson County during the relevant period, and that Vanco over the same period suffered a sharp decline in Falls City beer sales.

Falls City argues that the brewery price differential contributed only minimally to the retail price differential and that the decline in Vanco's Falls City sales was principally due to the increased popularity of competing major brand beers. However, Vanco was not required to show "that the illegality was a more substantial cause [of its injury] than any other." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143, 88 S.Ct. 1981, 1986, 20 L.Ed.2d 982. It is sufficient "with respect to causation if the defendant 'materially contributed' to plaintiff's injury * * * or 'substantially contributed notwithstanding other factors contributed also.'" *Id.*; see also *Bargain Car Wash*, *supra*, 466 F.2d at 1174, and cases cited therein. Moreover, there is testimony in the record to support the conclusion that the major reason for the higher Indiana retail beer prices was the higher prices charged Indiana distributors, and there is ample evidence, summarized by the district court, that the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail purchases from Vanco. Finally, while it is true that Falls City beer sales declined between 1972 and 1978 throughout Indiana and Kentucky, Vanco's volume dropped almost 60% while Indiana sales as a whole declined only 44%,

and Dawson Springs' volume dropped only 40% while Kentucky sales as a whole declined more than 46%. We do not find unreasonable the district court's conclusion that the more precipitous decline in Vanco's sales volume, as compared both with the substantially lesser decline in Dawson Springs' sales and the overall rates of decline in Indiana and Kentucky, was due to the loss of Evansville retail business to competing retailers in Henderson County.[11]

D. *Meeting Competition Defense*

Falls City also argues that it was entitled to use the meeting competition defense contained in Section 2(b) of the Robinson-Patman Act (15 U.S.C. § 13(b)). Section 2(b) permits a seller to rebut a *prima facie* case under Section 2(a) by showing that its lower price to any purchaser "was made in good faith to meet an equally low price of a competitor * * *." This Section "places emphasis on individual situations, rather than upon a general system of competition," and is designed to allow a seller to defend his business against genuine price competition. *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753, 65 S.Ct. 971, 974, 89 L.Ed. 1338. However, the exception does not justify the maintenance of discriminatory pricing among classes of customers that results merely from the adoption of a competitor's discriminatory pricing structure. *Id.* at 756, 65 S.Ct. at 976.

The district court rejected Falls City's Section 2(b) defense on the basis of its findings that Falls City's discriminatory pricing resulted from price increases in In-

[11] Falls City contends that Vanco's sales dropped only 58% while Indiana sales as a whole dropped 48% and that the district court's figures are erroneous. Even assuming, however, that Falls City's figures are correct, they still support an inference that Vanco lost sales at a greater rate than Indiana generally or Dawson Springs in Kentucky because of crossover purchasing from Evansville to Henderson County.

diana, not price decreases in Kentucky, and that in setting its Indiana prices Falls City was simply taking advantage of its competitors' policies of charging higher prices in Indiana than in Kentucky and other states. These findings are not clearly erroneous. There is nothing in the record to show that Falls City first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition. Indeed, Falls City's president testified that Falls City's Indiana price was set higher than its Kentucky price "because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned" (Tr. 948). The district court therefore did not err in finding that Falls City had failed to meet its burden of showing that its discriminatory pricing was a good faith effort to defend against competitors. Cf. *A. E. Staley Manufacturing Co., supra.*

In sum, our review of the evidence in the record does not leave us "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746. Accordingly, we affirm the trial court's finding that Falls City is liable to Vanco under Section 2(a) of the Robinson-Patman Act.

III. *The Measure of Damages*

The district court found that Vanco was injured in two ways over the relevant six-year period by Falls City's discriminatory pricing policy. First, it was forced to pass some of the price differential on to its customers in order to remain profitable and in turn suffered a loss in sales volume. Second, it was forced to absorb some of the price differential in order to stay competitive (that is, to keep its customers competitive) and thereby narrowed its profit margin. These factors demonstrate the requisite causal connection between the illegal price discrimination and the injury suffered. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23

L.Ed.2d 599. The district court further determined that Vanco's increased cost of doing business was $575,293.79, the total amount of the overcharges from 1972 to 1978, and therefore awarded that amount, trebled, to Vanco.

Falls City does not dispute the calculation of the overcharges, but insists that Vanco is entitled to recover only for lost profits. The district judge awarded damages under the automatic damage rule that a plaintiff who has proved itself damaged by illegal price discrimination is entitled to recover the amount of the discrimination. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757, 67 S.Ct. 1015, 1021, 91 L.Ed. 1219; *Fowler Manufacturing Company v. Gorlick*, 415 F.2d 1248, 1251-1252 (9th Cir. 1969), certiorari denied, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503; *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir. 1945), certiorari denied, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467.[12] Our Circuit has followed this rule of damages. *Grace v. E. J. Kozin Co.*, 538 F.2d 170, 174 (1976); see also *American Can Co. v. Lagoda Canning Co.*, 44 F.2d 763 (7th Cir. 1930), certiorari denied, 282 U.S. 899, 51 S.Ct. 183, 75 L.Ed. 792 (decided under Section 2 of the Clayton Act, 38 Stat. 730, before amendment by the Robinson-Patman Act).[13] However, that rule was just rejected by the Supreme Court. *J. Truett Payne Co. v. Chrysler Motors Corp.*, —— U.S. ——, —— - ——, 101 S.Ct. 1923, 1925-28, 68 L.Ed.2d 442 (1981).

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[12] In the subsequent case of *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), the Eighth Circuit reiterated the rule that "ordinarily, where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages * * *."

[13] *Contra, Enterprise Industries Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir. 1957), certiorari denied, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914; *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980).

Nevertheless, as the district judge recognized, an antitrust plaintiff is not required to prove the exact amount of its damages. A reasonable approximation will suffice. *J. Truett Payne Co. v. Chrysler Motors Corp.*, *supra*, —— U.S. at ——, 101 S.Ct. at 1929; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266, 66 S.Ct. 574, 580, 90 L.Ed. 652; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129. Here, if Falls City had sold its beer to Vanco at the same price it charged Dawson Springs, Vanco could have retained the difference, and it therefore appeared reasonable for the district court to award Vanco the amount of the overcharges.[14]

Unlike the situation in *J. Truett Payne Co.* where the lower courts bypassed the issue of liability and did not find a violation of the Robinson-Patman Act (—— U.S. at ——, 101 S.Ct. at 1929), Judge Holder correctly found that Vanco "proved the facts of each of the essential legal elements of the [Robinson-Patman] action * * * by a preponderance of the evidence" (defendant's App. A-28; see also A-29). Therefore, on remand, under *J. Truett Payne Co.* he must now assess plaintiff's damages by virtue of lost sales and profits. Since the case was largely tried and decided on the now repudiated "automatic damage" rule, the district judge is empowered to consider further evidence on the damage phase of this case.

IV. *The Excise Tax Overcharges*

The district court found with respect to Count III of Vanco's first amended complaint that Falls City had wrongfully overcharged Vanco for Indiana excise taxes

[14] The district court's seeming reasonableness in assessing damages is underscored by the fact that it declined to award Vanco the $766,000 claimed as the loss of its going-concern value, which, on the basis of the court's findings, was attributable in part to Falls City's price discrimination.

from 1961 to 1976 by paying the correct tax to Indiana and then billing Vanco for a greater amount.[15] For example, a typical 1973 invoice shows a 21¢ overcharge on 672 cases of beer (Supp.App. A-51). Similar small overcharges over the 15 years in question were found to total $17,251.77. Vanco discovered the overcharges in the summer of 1976 when it contemplated filing the Section 2(a) claim. Falls City ended the overcharges in October 1976, after Vanco's president brought the problem to Falls City's attention.

Falls City asserts that its practice had been simply to round out to the next highest tenth-cent the tax amount due to Indiana, and that this practice did not result in overcharges to Vanco because the total amount charged, consisting of the "unit price" and the "tax," was always equal to the announced f.o.b. price. In short, Falls City's argument is that any concealed overcharges in the "tax" component of the total price was offset by equivalent concealed undercharges in the "unit price" component so that Vanco paid the same total amount it would have had to pay had the breakdown between tax and unit price been calculated correctly on the invoices. However, the district court found, and the evidence supports its finding, that the controlling figures in each transaction were those listed on the invoice, not on the price announcement. The invoices show that the excise tax was treated as a distinct item from the unit price and that Vanco was consistently charged a higher amount for excise tax than was due or paid to Indiana.

The district court also found that the relevant statute of limitations was tolled because Falls City's conduct was a "continuing wrong" and was "concealed" by Falls City from Vanco, which relied on Falls City to calculate the tax and prices correctly. In so finding, the district

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[15] The tax was levied on all brewers selling to Indiana purchasers on a per-gallon basis, and Falls City passed this tax on to its distributors.

court was entitled to assess the credibility of the witnesses, and it was persuaded that Falls City's conduct had misled Vanco sufficiently so that under Indiana law it should not be permitted to repudiate the conduct.[16]

Again, we find no clear error in the district court's factual findings, and on the basis of those findings, Vanco was entitled under Indiana law for money had and received to have restored to it the difference between the amount Falls City paid Indiana and the higher amount it charged Vanco. *American Fletcher National Bank and Trust Co. v. Flick*, 146 Ind.App. 122, 130, 252 N.E.2d 839 (1970); *Ashton v. Shepherd*, 120 Ind. 69, 22 N.E. 98, 111 (1889).

For the foregoing reasons, the judgment is affirmed except as to damages under Count II.[17] The cause is remanded for the proper assessment of damages under that Count. Costs on appeal are to be borne by both parties.

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[16] Ind. Code § 2-609 (1977) provides: "If any person liable to an action, shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." The Indiana courts have interpreted this statute to estop a defendant from relying on a statute of limitations where "in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Marcum v. Richmond Auto Parts Co.*, 149 Ind. App. 120, 270 N.E.2d 884, 888 (*in banc* 1971).

[17] Other arguments raised by Falls City have been considered, but do not merit discussion.

Since Judge Holder is already familiar with the facts of this case, Circuit Rule 18 will not apply to the damage trial.

SWYGERT, Circuit Judge, dissenting.

I dissent from the majority's opinion because Falls City proved as a matter of law a meeting of competition defense under section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b).[1] The majority agrees with the district court's holding that the situation here is like the one in *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 65 S.Ct. 971, 89 L.Ed. 1338 (1945).[2] The *Staley* holding, however, is not at all apposite to the situation in this case. In *Staley*, the defendants had adopted a basing-point system used by their competitors in the manufacture and sale of glucose. This pricing system was found illegal in a related opinion, *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). The Court held in *Staley* that defendants' showing that they had followed the illegal pricing system of their competition did not prove a defense under section 2(b) to justify the price discrimination.[3] In this case, on the other hand, no one has suggested that the prices charged in Indiana by Falls City's competitors—the larger brewers

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[1] Section 2(b), 15 U.S.C. § 13(b) (1976), reads in relevant part,

> . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet as equally low price of a competitor, or the services or facilities furnished by a competitor.

[2] *See* majority opinion, *supra*, pp. 1230-1231.

[3] The Court wrote that Staley would be entitled to a section 2(b) defense "only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by its competitors." *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, 65 S.Ct. 971, 974, 89 L.Ed. 1338 (1945). *See* Rowe, *Price Discrimination under the Robinson-Patman Act* (1962), pp. 221-22 (*Staley* prevented "a seller from vindicating an otherwise unlawful price discrimination by aping another's illegal price in the context of collusion.").

such as Anheuser-Busch and Pabst—were at all illegal, so that merely following their prices did not by itself make Falls City's pricing policies illegal.

The majority opinion and the district court both view the price discrepancies as a result of Falls City's *raising* its prices to its Indiana wholesalers. That statement is no more accurate than it would be to state that the differentials were caused by *lowering* the prices to Falls City's Kentucky customers. There was no norm or starting point against which such statements could be tested. Pricing polices are the result of competitive forces that develop over the years. The fact that brewers' prices, including Falls City's, have reached a higher level in Indiana than in Kentucky is only a reflection of those trends. The majority ignores this fact and bases its opinion solely on the existing discrepancy in prices charged by Falls City. A determination as to whether Falls City has shown a meeting-competition defense cannot rest on so narrow a perspective. As the Supreme Court has noted, a section 2(b) defense is to be "a flexible and pragmatic, not technical or doctrinaire, concept." *United States v. United States Gypsum Co.*, 438 U.S. 422, 454, 98 S.Ct. 2864, 2882, 57 L.Ed.2d 854 (1978), quoting *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963).

While it is true that Robinson-Patman "places emphasis on individual competitive situations, rather than upon a general system of competition," *Staley*, *supra*, 324 U.S. 753, 65 S.Ct. at 974, this does not mean, as the district court held, that Falls City could not meet a general range of competitors' prices in Kentucky by instituting a single competitive price.[4] The fact that all

[4] Similarly, the fact that Falls City had to meet competition in Kentucky did not mean it had to lower prices in Indiana. As the Supreme Court noted in *Standard Oil v. FTC*, 340 U.S. 231, 250, 71 S.Ct. 240, 250, 95 L.Ed. 239 (1951), "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to *all* its customers to match the

of Falls City's competitors in Kentucky did not agree upon a single price should not deprive it of the opportunity to meet that competition. It chose to do so by charging a single price statewide, rather than meeting the different prices of other brewers in each county. As noted in *Callaway Mills v. FTC*, 362 F.2d 435, 441 (5th Cir. 1966), the adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition. That is all Falls City did in this case.[5]

It is the essence of the free market that a seller will charge as much as competition allows. One can assume that Falls City would charge as high a price as it could in both Kentucky and Indiana, and that it would charge the higher Indiana price in Kentucky if it could. Competition among brewers in Kentucky, however, was evidently stiffer than it was in Indiana, for the prices charged by all brewers was lower in Kentucky. Falls City was therefore forced to charge a lower price in Kentucky to meet the competition there. Such action is the essence of a section 2(b) defense.[6]

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price offered to *one* or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." (emphasis added)

[5] The district court also held that Falls City could not claim it was meeting competition because it had not received any threats from Kentucky wholesalers that they would buy beer elsewhere. No seller should ever have to wait to receive such threats before it can meet competitors' lower price, and no case has ever so held.

[6] I also dissent with respect to the majority's holding that Falls City overcharged Vanco for state taxes. The problem seems to have arisen from a rounding error on Falls City's invoices. Vanco does not dispute that it always paid the price it expected to pay—the announced F.O.B. price at Falls City's loading docks—nor that Falls City paid the State of Indiana exactly what it was due. Only by placing technicality over reality can the majority hold that an overcharge existed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

No. EV 76-170-C

VANCO BEVERAGE, INC.

v.

FALLS CITY INDUSTRIES, INC.

Dated April 14, 1980

[¶ 63,357]

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

HOLDER, D. J.: This bench trial was commenced on May 14, 1979 and was concluded on May 18, 1979 with a post trial briefing schedule that was concluded on February 5, 1980. The issues of the pleadings were presented by the December 28, 1976 complaint, as amended by the November 30, 1977 first amended complaint, and as amended in the pre-trial conferences of January 5, 1979, and the plaintiff's supplemental complaints filed October 17, 1978 and May 14, 1979, by the April 6, 1977 answer to the complaint, the December 21, 1977 answer to the amended and first amended complaint, as amended in pre-trial conference of May 14, 1979, and as amended on May 15, 1979; and by plaintiff's May 16, 1979 reply to defendant's amended affirmative defenses of answer as amended on May 18, 1979.

The original complaint filed December 28, 1976 was in three counts against Falls City Brewing Company. The first amended complaint filed May 15, 1979 was in five counts, the first three counts of which are the same as the three counts of the original complaint. Counts four and five were added in the amended complaint to

include claims occurring after the commencement of the action pertaining to defendant's awarding distribution rights for a new brand of beer, "Billy Beer", to Working Beverage, Inc., a competitor of plaintiff, and added Working Beverage, Inc. as a defendant. Plaintiff on January 5, 1979 dismissed the actions stated in counts four and five against Falls City Brewing Company and Working Beverage, Inc. when such actions allegedly were mooted by the commercial failure of "Billy Beer" and Working Beverage, Inc. ceased stocking and selling such product.

Plaintiff, Vanco Beverage, Inc., alleges in counts one and two of the amended complaint, as amended and supplemented and defendant admits, that it is an Indiana corporation which distributed, among other beers, the beer products that were brewed by the defendant, Falls City Brewing Company, that plaintiff was for many years the defendant's only distributor in Vanderburgh County in the State of Indiana; that the defendant, Falls City Brewing Company, is a Kentucky corporation which brewed beer in its brewery located in the City of Louisville, State of Kentucky, and sold such under the brand names or labels of "Falls City Beer" and "Drummond Bros. Preferred Beer"; and that there was only one grade and quality of beer brewed and sold by defendant for each of such brands and labels that was sold in the following sizes and types of containers:

(A) cases of 24/12 ounce Exports (*i.e.*, returnable bottles);

(B) cases of 24/12 ounce Cans in 12 packs;

(C) cases of 24/12 ounce Cans in 6 packs;

(D) cases of 24/12 ounce No Return Pints;

(E) cases of 12/32 ounce No Return Quarts;

(F) ½ Bbls.; and

(G) ¼ Bbls.;

that defendant was engaged in interstate commerce in that it sold a substantial quantity of beer brewed in the State of Kentucky to wholesale distributors, including the plaintiff, located in Indiana; that defendant offered and sold such brands and labels of its beer in such containers to wholesalers in the State of Kentucky from at least July 1, 1972 and continuing up to and including November 30, 1978 at lower prices than the prices offered and granted to and paid by plaintiff; and such price differential was not due to differences in delivery costs as defendant's prices were F. O. B. defendant's brewery in Louisville, Kentucky.

Count one of the amended complaint as amended and supplemented, alleged and defendant denies that defendant, and various beer wholesalers located in the State of Kentucky and defendant's brewer competitors who were also members of the United States Brewers Association engaged in a conspiracy; the object of such conspiracy was to unreasonably restrain trade and commerce in the sale of beer, including the brands and labels of defendant, known as "Falls City Beer" and "Drummond Bros. Preferred Beer", in and between the States of Indiana and Kentucky by maintaining a differential in prices whereby defendant and these brewers charged higher prices to their Indiana customers than to their customers located in Kentucky in violation of Section 1 of the Sherman Antitrust Act (Title 15 U.S.C. Section 1); allegedly has attempted to monopolize, or conspired to monopolize, the sale of "Falls City Beer" and "Drummond Bros. Preferred Beer", in the alleged relevant geographic market area [1] in violation of Section

[1] The relevant geographic product market includes, in part, Vanderburgh, Warrick and Posey Counties in the State of Indiana and Henderson County in the State of Kentucky. In this area, it is alleged in counts one and two of the amended complaint, as amended and supplemented, wholesalers located in both the States of Indiana and Kentucky compete for sales of defendant's brand of beer to

2 of the Sherman Antitrust Act (Title 15 U.S.C. Section 2); that pursuant to such conspiracy, since at least July 1, 1972 continuously to and including November 30, 1978 defendant has offered and granted to wholesalers in the State of Kentucky lower prices for such two brands of beer than the prices to plaintiff; and that interstate commerce has been affected and restrained by the above alleged violations which occurred in the course of defendant's interstate business, namely sales to Indiana distributors. Plaintiff alleges and defendant admits that the claim stated in count one is a civil action for treble damages and attorney fees arising under Section 4 of the Clayton Act (Title 15 U.S.C. Section 15) and Sections 1 and 2 of the Sherman Antitrust Act (Title 15 U.S.C. Sections 1 and 2); that the Court has jurisdiction under Title 28 U.S.C. Section 1337; and that the venue is properly in the geographic jurisdiction of this Court. As a result of defendant's above alleged violations, plaintiff alleges in count one, which is denied by defendant, that consumers have bought less of defendant's beer from Indiana retailers than they would have bought if not for the fact that the alleged monopoly, combination and conspiracy has resulted in higher retail prices in Indiana, Indiana retailers have bought less of defendant's beer from plaintiff than they would have bought, but for the higher retail prices; that plaintiff allegedly suffered a diminution of the going concern value of its business in the sum of $766,000.00; and that plaintiff has been overcharged for beer purchased from defendant in the sum of $575,000.00 over the prices charged wholesalers in the State of Kentucky. Plaintiff prays for judgment against defendant as to count one for its alleged damages, that this amount be trebled as required by Section 4 of the Clayton Act (Title 15 U.S.C. Section 15), and for reasonable attorney fees and costs.

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retailers located in the relevant geographic market area, and in which retailers allegedly compete for sales of defendant's brands of beer to consumers living in this relevant geographic market area.

The defendant filed an affirmative defense of answer to plaintiff's claim in count one alleging, which plaintiff denies, that plaintiff's claim is barred by the applicable statute of limitations (Title 15 U.S.C. Section 15b) in that it was not commenced within four (4) years after the accrual of plaintiff's action and/or there can be no recovery for complained of actions occurring prior to December 28, 1972, being more than four (4) years before the filing of the original complaint on December 28, 1976. In plaintiff's reply of May 18, 1979 the plaintiff alleges, and defendant denies, that plaintiff did not discover the conspiracy complained of in count one until on or about June 22, 1978 when an officer of defendant was deposed due to the defendant's fraudulent concealment of such wrongs and the alleged statute of limitations is tolled until such discovery.

Count two of the amended complaint as amended and supplemented, alleges and defendant denies that defendant, since at least July 1, 1972 continuously to and including November 30, 1978, has sold its labeled brands of beer to wholesalers in the State of Kentucky at a lower price than to plaintiff, despite the fact that such State's wholesalers and plaintiff directly competed in the same alleged relevant geographic market in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15 U.S.C. Section 13(a)); it is also alleged that as a result of the price discrimination plaintiff has been injured in that it has been and continues to be unable to effectively compete with the State of Kentucky's wholesalers in the alleged relevant geographic product market referred to in count one of the complaint as amended and supplemented; and that interstate commerce has been affected and restrained by the above alleged violations which occurred in the course of defendant's interstate business, namely sales to Indiana distributors. Plaintiff alleges and defendant admits that the claim stated in count two is a civil action for treble damages and attorney fees arising under Sections 2 and 4 of the Clayton Act (Title

15 U.S.C. Sections 13 and 15); that the Court has jurisdiction under Title 28 U.S.C. Section 1337; and that the venue is properly in the geographic jurisdiction of this Court. As a result of defendant's above alleged violations plaintiff alleges in count two, which is denied by defendant, that plaintiff has been unable to effectively compete with wholesalers in the State of Kentucky in the alleged relevant geographic product market because consumers have bought less of defendant's labeled brands of beer from Indiana retailers than they would have bought if not for the fact that defendant's alleged discriminatory pricing policies resulted in higher retail prices, Indiana retailers have bought less defendant's products from plaintiff than they would have bought, but for the price differential; that plaintiff allegedly suffered a diminution of the going concern value of its business in the sum of $766,000.00; and that plaintiff has been overcharged for beer purchased from defendant in the sum of $575,293.79 over the prices charged wholesalers in the State of Kentucky. Plaintiff prays for judgment against defendant as to count two for its alleged damages, that this amount be trebled as required by Section 4 of the Clayton Act (Title 15 U.S.C. Section 15), and for reasonable attorney fees and costs.

The defendant filed a first affirmative defense of answer to plaintiff's claim in count two alleging, which plaintiff denies, that plaintiff's claim is barred by the applicable statute of limitations (Title 15 U.S.C. Section 15b) in that it was not commenced within four (4) years after the accrual of plaintiff's action and/or there can be no recovery for complained of actions occurring prior to December 28, 1972, being more than four (4) years before the filing of the original complaint on December 28, 1976. In plaintiff's reply of May 18, 1978 the plaintiff alleges, and defendant denies, that plaintiff did not discover the wrongs complained of in count two of the complaint until approximately July of 1974 due to defendant's fraudulent concealment of such

wrongs and the alleged statute of limitations is tolled until such discovery.

The defendant filed a second affirmative defense of answer to plaintiff's claim in count two alleging, which plaintiff denies, that defendant's allegedly discriminatory prices do not constitute a violation of the Clayton Act since defendant's lower prices to wholesalers in the State of Kentucky were made in good faith to meet an equally lower price of a competitor as authorized by Title 15 U.S.C. Section 13(b).

The defendant filed a third affirmative defense of answer to plaintiff's claim in count two alleging, which plaintiff denies, that defendant's actions were in conformity with the provisions of IC Section 7.1-1-1-1 et seq. and Chapters 241-244, inclusive, Kentucky Revised Statutes, which statutes are given primacy by reason of the provisions of the Twenty-first Amendment to the Constitution of the United States of America.

Count three of the amended complaint as amended and supplemented is an action on one of the common counts of money had and received and alleged, and defendant denies, that defendant misrepresented to plaintiff the true amount of beer excise tax owed by defendant to the State of Indiana for the purchases of beer made by plaintiff from defendant from at least July, 1961 continuously to and including October 31, 1976; it is also alleged defendant invoiced such excessive amounts of excise tax and plaintiff paid such excessive amounts of excise tax to defendant in reliance on its long-standing relationship of mutual trust by plaintiff of defendant and thus did not discover the alleged overcharge until approximately July of 1976. The plaintiff alleges and defendant admits that the Court has jurisdiction of the claim made in count three by virtue of the doctrine of pendant jurisdiction to its jurisdiction of the claims

made in counts one and two. As a result of defendant's above alleged overcharge of excise tax plaintiff alleges in count three, which is denied by defendant, that defendant is indebted to plaintiff for the amount of such overcharged excise tax. Plaintiff prays for judgment against defendant as to count three for a refund of the amount of Indiana State Excise Tax overcharges collected from defendant by plaintiff and costs of the action.

The defendant filed a first affirmative defense of answer to count three, which the plaintiff denies, alleging that:

(a) Count three alleges activity constituting a sale of goods subject to the Uniform Commercial Code of the State of Kentucky (KRS 355.2-1 et seq.), or of the State of Indiana (IC Section 26-1-2-1 et seq.), and the applicable statute of limitations (KRS 355.2-725(1)) or (IC Section 26-1-2-725(1)) bars actions unless commenced within four (4) years after the cause of action accrued, therefore, it is alleged there can be no recovery for actions accruing prior to December 28, 1972 as this action was commenced on December 28, 1976, or alternatively;

(b) Count three, it is alleged, alleges a contract partially in writing. The applicable statute of limitations (KRS 413.120(1), or IC Section 34-1-2-1) bars actions unless commenced within five (5), or six (6) years, respectively, after the cause of action accrued, therefore, it is alleged there can be no recovery for actions accruing prior to December 28, 1971, or December 28, 1972, depending upon the choice of State law applied as this action was commenced on December 28, 1976, or alternatively;

(c) Count three, it is alleged, alleges an action based on mistake. The applicable statute of limitations (KRS 413.120(12)) bars actions unless commenced within five (5) years after the cause of action accrued, therefore, it

is alleged there can be no recovery for actions accruing prior to December 28, 1971 as this action was commenced on December 28, 1976. In plaintiff's reply of May 18, 1978, the plaintiff alleges, and the defendant denies, that plaintiff did not discover defendant's wrongs alleged in count three until approximately October, 1976 but in no event earlier than September 1, 1976 as a result of the defendant's alleged fraudulent concealment and each of the alleged statutes of limitations is tolled until such discovery.

This action was commenced on December 28, 1976. About two (2) years later on November 30, 1978, during the pendency of the action, Falls City Brewing Company terminated its brewing operations. It sold its beer brands and labels to G. Heileman and Company. It sold its brewery and equipment to other purchaser or purchasers. It has, since November 30, 1978, operated a beer distributorship in Louisville, Kentucky, and a trucking business in St. Louis, Missouri. In November 1978 the defendant changed its name to Falls City Industries, Inc. Because of defendant's change of business objectives the time period involved in counts one and two is from July 1, 1972 until November 30, 1978.

The plaintiff, Vanco Beverage, Inc., at all times in question, was and is an Indiana corporation with its principal offices and facilities situated in the City of Evansville, Indiana. The plaintiff has been a wholesale distributor of beer since 1954 including brands of beer produced by the defendant, Falls City Brewing Company, a Kentucky corporation, known as "Falls City Beer" since 1954, and "Drummond Bros. Preferred Beer" since 1973. The defendant in 1977 introduced a new brand of beer known as "Billy Beer" but the plaintiff never distributed this new brand. The defendant's principal offices are and its brewing facility was situated in the City of Louisville, State of Kentucky. The plaintiff was the sole distributor of defendant's brands of beer except

for the "Billy Beer" brand in Vanderburgh County, Indiana. There was only one grade and quality of beer brewed and sold by defendant for each of such brands which was sold in at least the following sizes and types of containers to all of its wholesale distributors of beer in the thirteen States in which its products were distributed:

(A) cases of 24/12 ounce Exports (*i.e.*, returnable bottles);

(B) cases of 24/12 ounce Cans in 12 packs;

(C) cases of 24/12 ounce Cans in 6 packs;

(D) cases of 24/12 ounce No Return Pints;

(E) cases of 12/32 ounce No Return Quarts;

(F) ½ Bbls.; and

(G) ¼ Bbls.

The defendant, at all times in question, was engaged in interstate commerce in that it sold a substantial quantity of beer brewed in the State of Kentucky to wholesale distributors in thirteen States, including plaintiff, a wholesale distributor in the State of Indiana.

Pertinent statutes of the State of Indiana set the rate and conditions for payment of beer excise tax. Since 1961 such tax was calculated on a per gallon basis. Defendant's invoices to plaintiff translated the per gallon figure to a per case of beer figure. The plaintiff relied on the defendant to correctly calculate such tax for the payment of such tax by plaintiff to defendant. For fifteen (15) years defendant collected more in tax payments from plaintiff than defendant forwarded to the State of Indiana to satisfy such tax requirement. The plaintiff learned of these overcharges for the first time in July of 1976 when plaintiff began computing the defendant's product overcharges to plaintiff for beer when compared to defendant's wholesale distributors in other States, particularly the defendant's Kentucky distributor in the relevant geographic market area. Plaintiff called

such overcharge of tax to defendant's attention at a meeting in Louisville, Kentucky, in October 1976 which meeting was held by plaintiff and defendant in an attempt to avoid litigation over its claims in counts one and two. Following such meeting the next invoice of defendant for November 5, 1976 reveals that for the first time in fifteen (15) years defendant correctly computed the translation of the per gallon charge to a per case charge. The amount defendant collected from plaintiff as tax in excess of that it was required to and did pay to the State of Indiana was $17,251.27. The defendant's efforts to explain away this overcharge were too ridiculous to be worthy of note as such explanation is not supported by evidence. The defendant is indebted to plaintiff for such tax overcharge plus 8% per annum interest upon each overcharge from the date of each overcharge to the date of judgment, an itemized list of the overcharges and dates thereof is attached hereto and made a part hereof. Trial Exhibit 85A is attached.

Plaintiff's relevant geographic market area includes the Counties of Vanderburgh, Warrick and Posey in the State of Indiana and the County of Henderson in the State of Kentucky. Wholesalers of beer located in such geographic areas compete for sales of the brands of "Falls City Beer" and "Drummond Bros. Preferred Beer" to retailers located in the geographic area, and in which retailers compete for sales of such beer brands to consumers living in such geographic area and traversing in and through such geographic area. These counties are considered by the United States of America as a single metropolitan area for reporting labor employment statistics. Television and radio media also considered these counties to be a unified marketing area. The defendant has employed in its sales program of its beer television and radio media beamed from the City of Evansville, Indiana, and from Henderson, Kentucky, for such geographic area. Vanderburgh County, Indiana, is bordered on the south by the Ohio River, except for that portion

of Henderson County, Kentucky, that lies north of the Ohio River to which Vanderburgh County is contiguous. The City of Evansville is located in the southern part of Vanderburgh County and its likewise borders on the Ohio River and that part of Henderson, Kentucky, that lies north of the Ohio River. A substantial number of business enterprises, industry, and the population of the relevant geographic market area is located in Vanderburgh County, Indiana, and its environs. Henderson County, Kentucky, is further united with the rest of the relevant geographic market area by an ultra modern north-south public highway known as U.S. Highway No. 41 which bridges the Ohio River between Evansville, Vanderburgh County, Indiana, and Henderson County, Kentucky, and continues on into the Town of Henderson, Kentucky. That stretch of U.S. Highway No. 41 south of the Ohio River to the Town of Henderson, Kentucky, has many shopping centers and retail establishments, including a substantial number of beer retailers. The defendant had full knowledge of such relevant geographic market area for its beer sales through its State of Kentucky and State of Indiana wholesale distributors situated therein. The defendant advertised through the media situated in such relevant market area to reach such relevant market area retailers and the ultimate customer or user of beer. The defendant also was aware of such competitive area from its studies of the sales records of its wholesale distributors in the area from the State of Kentucky and Indiana.

The defendant made no deliveries of its beer to its independent distributors, in thirteen States, including the States of Kentucky and Indiana. The defendant's distributors, no matter where located, picked up the same beer in their own equipment at the defendant's facilities in Louisville, State of Kentucky. Thus, the beer delivery expense of defendant was the same as to all of defendant's distributors and there being no such added expense to defendant's delivery expense, such could not be a factor

for any differential in pricing of its beer to its various distributors in the thirteen States. The distributors paid defendant for the beer at the time of delivery. The plaintiff provided its vehicle operators with blank checks which were filled out by defendant in an amount to cover the total amount of product charge termed "Unit Price" on defendant's invoices, plus the "Indiana Tax" also set out on the "invoices". At all times in question, the defendant charged a substantially greater price for all of its beer sold to each of the Indiana wholesale distributors than it charged for the same beer sold to each of its wholesale distributors in each of the other twelve States, including the State of Kentucky and the relevant geographic area, in which its beer was distributed. The price referred to is the price charged by defendant exclusive of the added State tax charges due to the possible differences in State tax on beer. During the period January 1, 1971 through December 12, 1973, defendant charged plaintiff 17.9% more than it charged its wholesale distributors in the State of Kentucky for a case of beer in returnable bottles, 9.69% for a case of beer in cans of 12 pack, 12.3% for a case of beer in cans of 6 packs, 12.5% for a case of beer in 12 oz. no return bottles, 15.5% for a case of beer in 32 oz. no return bottles, and 17.3% for one-half barrels of beer. The percentage by which plaintiff was charged more than wholesale distributors in the State of Kentucky for the same packages from December 13, 1973 until July 4, 1974 was 29.2%, 17.15%, 17.9%, 20.99%, 22.8% and 27.45%, respectively. For the period July 5, 1974 through December 29, 1974, the percentage overcharge from these packages was 29.2%, 15.6%, 17.9%, 20.49%, 20.0% and 23.2%, respectively. From December 30, 1974 through January 1, 1976, the percentage overcharge from these packages was 19.2%, 14.9%, 15.5%, 18.3% and 23.2%, respectively. From January 2, 1976 through January 31, 1977, the percentage overcharge for a case of beer in 24/12 oz. returnable bottles was 10.3%, 13.8%

for a case of beer in 24/12 oz. cans of 12 pack, 13.8% for a case of beer in 24/12 oz. cans of 6 pack, 13.8% for a case of beer in 24/12 no return bottles, 12.3% for a case of beer in 24/16 oz. cans in 6 pack, 11.8% for a case of beer in 24/7 oz. no return bottles, 14.5% for a case of beer in 12/32 oz. no return bottles, and 22.9% for one-half barrel of beer. From February 1, 1977 through April 24, 1977, the percentage overcharge for a case of beer in 24/12 oz. returnable bottles was 10.3%, 13.4% for a case of beer in 24/12 cans of 12 pack, 13.4% for a case of beer in 24/12 oz. cans of 6 pack, 14.9% for a case of beer in 24/12 oz. no return bottles, 13.2% for a case of beer in 24/16 oz. cans of 6 pack, 15.7% for a case of beer in 24/7 oz. no return bottles, 14.5% for a case of beer in 12/32 oz. no return bottles, and 22.9% for a one-half barrel of beer. From April 25, 1977 through November 30, 1978, the percentage overcharge for a case of beer was the same as that for the period February 1, 1977 through April 24, 1977 except the percentage overcharge for a case of beer in 24/12 oz. no return bottles which was 14.3% and 12.4% for a case of beer in 12/32 oz. no return bottles. The total amount by which defendant overcharged plaintiff from July 1, 1972 through November 30, 1978 was $575,293.79. The plaintiff and defendant's wholesale beer distributor in the State of Kentucky situated in the relevant geographic market area competed for sale of defendant's beer to beer consumers of beer from retailers situated in such relevant geographic market area. Such retailers situated in such relevant geographic market area competed for sales of defendant's beer to consumers living in and traversing such relevant geographic market area. Such pricing policies of defendant resulted in lower retail prices for defendant's beer in Henderson County, State of Kentucky, than in the Indiana portion of such relevant geographic market area. The Kentucky wholesale distributor of defendant's beer passed on the beer cost savings to retailers in Henderson County, State of Kentucky.

A substantial number of consumers living in the Indiana part of the relevant geographic market area during the relevant time in question frequently purchased their beer from retailers located in Henderson County, State of Kentucky, because of such pricing policies of defendant. The Kentucky wholesale distributor of defendant's beer through the Henderson County, State of Kentucky, retailers had a competitive advantage over plaintiff and plaintiff's Indiana retailers. This injury to the competition in the relevant geographic market for beer is also demonstrated by the fact that the Indiana retail customers bought their beer at the cheaper price from Henderson County, State of Kentucky, from package stores or carryout stores where beer could not be consumed on the premises as distinguished from restaurants and bars where beer is also consumed on the premises. A retailer who may permit consumption of beer on such retailer's premises sells a greater percentage of beer packaged in returnable bottles than other types of beer packaging. A retailer who cannot permit consumption of beer on such retailer's premises, that is package stores or carryout stores, sells a greater percentage of beer packaged in cans than other types of beer packaging. The plaintiff serviced over three hundred retailers in Vanderburgh County, Indiana, of which the top ten sellers of beer were package liquor stores. A comparison between defendant's Kentucky wholesale distributor servicing Henderson County, State of Kentucky, retailers with plaintiff servicing Vanderburgh County, Indiana, retailers discloses that for the period 1972 through 1977 plaintiff's returnable bottles accounted for 47.87% of its total sales while plaintiff's sales of cases of canned beer (24/12 cans and 24/16 cans) was 28% of its total sales of beer and one-half of plaintiff's volume of defendant's beer was sold in restaurants and taverns where it was substantially consumed on the premises and defendant's Henderson County, State of Kentucky, distributor of its beer to retailers in Henderson County, State of Ken-

tucky, sales of returnable bottles was 24.21% of its total sales and sales of cases of canned beer (24/12 cans and 24/16 cans) was 60% of its total sales of beer. The defendant's Henderson County, State of Kentucky, distributor of its beer to off-premises retailers was 75% of its accounts, such as package liquor stores and grocery stores. Such Henderson County, State of Kentucky, retailers were far more successful in selling beer for off-premises consumption than were Vanderburgh County, Indiana, retailers serviced by plaintiff. Such a high percentage of canned beer was sold because consumers who were residents of Indiana and dry counties of the State of Kentucky traveled to or waited until they passed through Henderson County, State of Kentucky, and bought beer from retailers in Henderson County, State of Kentucky, rather than Evansville, Indiana, retailers because the Henderson County, State of Kentucky, retailers offered cheaper prices for beer.

During the relevant time, the defendant experienced decreasing sales in the States of Indiana and Kentucky. The plaintiff's sales of defendant's beer decreased at a much faster rate, that is 59.12%, than defendant's sales decreased in the State of Indiana as a whole, that is 44%. The plaintiff's sales of defendant's beer decreased at a much faster rate, that is 59.12%, than did those of defendant's, Henderson County, State of Kentucky, distributor of defendant's beer, that is 40.96%. The defendant's Henderson County, State of Kentucky, distributor of defendant's beer sales decreased at a much slower rate, that is 40.96%, than defendant's sales decreased in the State of Kentucky as a whole, that is 46.3%. The differences between the rates of sales decreases during the period 1972-1975 disclose an even greater injuring effect upon competition because of the discrimination of defendant. At the end of the year 1975, plaintiff's sales of defendant's beer were down 43.91%, defendant's sales to distributors in all of Indiana were down 26.8%, and defendant's Henderson

County, State of Kentucky, distributor sales were down only 6.5%, and defendant's sales to distributors in the State of Kentucky were down 15.64%. Plaintiff's sales of defendant's beer decreased faster than defendant's sales in the State of Indiana because carryout beer customers were invited by advertising and going to Henderson County, State of Kentucky, retailers to make their beer purchases. The loss of beer business to the retailers in Vanderburgh County, State of Indiana, due to price discrimination was a problem which increased with the passage of time and reached a serious economic effect in 1974. Plaintiff experienced gradual loss of business as did other of defendant's distributors. While some Henderson County, State of Kentucky, retailers were selling more beer due to such price differences, it was not enough to alert the plaintiff to the problem. In 1973, plaintiff noticed more consumer traffic from Indiana purchasing beer in Henderson County, State of Kentucky. In 1974 events occurred which substantially altered customer purchasing of beer in Vanderburgh County, State of Indiana. In 1973 a wage price freeze was imposed by the United States of America. Plaintiff found that "built in" cost increases, such as nonnegotiable wage escalations in labor contracts, had developed to the point that plaintiff had to increase the price of defendant's beer as other of defendant's Indiana distributors had already done. The defendant learned of plaintiff's plans and informed plantiff that defendant would raise its wholesale price to plaintiff and take away plaintiff's increase if plaintiff raised its prices of defendant's beer to retailers. In early 1974, plaintiff raised prices and so did defendant. Defendant did not raise the prices of its beer sold to its Kentucky distributors. In early July of 1974, plaintiff again raised the price of defendant's beer to retailers due to plaintiff's increase in costs and defendant again raised the price of beer to plaintiff in early July 1974 and on this occasion defendant raised its beer prices to all of its Kentucky distributors. Defendant's

Henderson County, State of Kentucky, distributor did not raise the price of defendant's beer to its retailers until September of 1974. From July of 1974 through July of 1975, the differential between prices charged by defendant to its Kentucky and Indiana distributors was at its peak. In July and August of 1974 the price differential at the retail level was even greater because Kentucky beer distributors of defendant deferred raising prices until September of 1974. During this period the Indiana consumer beer traffic to and from Henderson County, State of Kentucky, was so great that Indiana Excise Police of the Indiana Alcohol Beverage Commission made a limited number of arrests of persons importing beer into Indiana without a license. Many beer consumers in Vanderburgh County, Indiana, who had not previously shopped for low price beer acquired the shopping habit during 1974. In addition to the defendant's beer price differential between Indiana and Kentucky that it charged distributors, the defendant in 1972 charged sixty cents deposit on returnable bottles of beer so packaged and sold to plaintiff and at the same time charged eighty-four cents deposit on such bottles to the Kentucky distributors. The difference in the deposit encouraged Indiana residents who paid sixty cents deposit to return such bottles to Kentucky for the greater deposit return and buy more beer at a lower price while in Kentucky. Getting the beer customers to go to Henderson County, State of Kentucky, for low prices also had the effect of customers purchasing other brands than that of defendant's beer. There is no direct correlation between plaintiff's losses and the sales of defendant's Henderson County, State of Kentucky, distributor of defendant's beer, that is that consumers attracted to defendant's low priced beer may have bought brands of beer distributed by competitors of defendant's Henderson County, State of Kentucky, distributor both in Henderson County, State of Kentucky, and in neighboring areas of Kentucky. Defendant's Henderson County, State of Kentucky, dis-

tributor was not the only distributor of defendant's beer in Kentucky. Defendant's Henderson County, State of Kentucky, distributor had to charge prices that were competitive with prices charged by defendant's distributors in the State of Kentucky including Paducah, one hundred miles west of Henderson, and Hopkinsville, eighty-five miles from Henderson, in order to attract beer consumers from "dry" counties in Kentucky where no beer was sold. The total beer sales including defendant's brands and all other brands in Vanderburgh County, Indiana, were adversely affected by the lower retail beer prices in the State of Kentucky. During the five year period 1972-1977 sales of beer increased 20.07% in the State of Indiana and increased in Vanderburgh County, Indiana, at a rate 11% less than the State of Indiana as a whole due to the price discrimination practiced by defendant and defendant's competitors in favor of their Kentucky distributors who passed the lower Kentucky prices on to their Kentucky retailers. The Court finds that the cause of such difference between the rate of decrease of the defendant's Henderson County, State of Kentucky, distributor's sales of defendant's beer and plaintiff's respective rates of decrease in defendant's beer sales was such price discrimination by defendant because such price discrimination prevented retailers in Evansville, State of Indiana, from being effective competitors with retailers in Henderson County, State of Kentucky, and within such relevant geographic market area.

The defendant's lower prices to its wholesaler in Henderson County, State of Kentucky, caused plaintiff to incur loss of sales and this was known to defendant by February 15, 1974. The defendant knew that retail customers were purchasing the lower priced beer from the Kentucky retailers in the relevant geographic market area. The plaintiff's first knowledge of the Henderson County, State of Kentucky, retailers lower prices of de-

fendant's beer and the effect thereof in the relevant geographic market area was in the summer of 1974 by Evansville, Indiana, newspaper stories of activities of Indiana law enforcing officials in making arrests of retail buyers of Kentucky retail sellers when they transported such beer into Indiana, and the news media advertisements to Indiana retail buyers of Henderson County, State of Kentucky, retail sellers offers of sale of defendant's products at lower prices than Indiana retailers in the relevant geographic market area. The defendant concealed from the plaintiff the favorable discriminatory lower price differential to defendant's Henderson County, State of Kentucky, wholesaler over plaintiff and the first reasonable available notice of such was in the summer of 1974 under the circumstances referred to above.

The defendant's contention that the lower prices to its Kentucky distributors so competing with plaintiff were made in good faith to meet an equally lower price of a competitor of defendant is unsupported by the evidence. Defendant's prices were not established in good faith to meet an equally lower price of a brewery competitor. The lower price accorded defendant's Kentucky distributors of beer in the relevant geographic market area was not the result of a threat from such Kentucky distributors that they would buy their beer from other brewers or from other brewers selling beer at a lower wholesale price unless defendant adjusted its wholesale price of beer. Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant's pricing policy was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers as the Kentucky competitors had all kinds of prices. The defendant raised its prices to wholesale dis-

tributors in the State of Indiana, including the plaintiff. It was done by defendant to obtain more profit for defendant. The defendant set its Indiana price higher than its Kentucky price for the sole reason that it followed the other brewers, or leaders of other beers for its profit. It was not meeting competition, its action was to get a higher price in Indiana than in Kentucky. Defendant's lower price to Kentucky competitors of plaintiff was not due to any differences in cost of manufacture, sale, or delivery to Indiana and Kentucky distributors. Defendant's lower price to Kentucky competitors of plaintiff was not established, nor was it a change in price in response to changed conditions affecting the market for or the marketability of defendant's beer.

Regulation of the beer industry relevant to the issues of this case in the United States is in the States, including the States of Indiana and Kentucky. The Indiana law prohibited plaintiff from selling beer to retailers in Kentucky. The Kentucky law prohibited defendant's wholesale distributors in Kentucky from selling beer to retailers in Indiana. The defendant, at all times in question, was obligated under Indiana law to pay an excise tax on all beer sold to licensed Indiana wholesalers. The defendant, at all times in question, was obligated under Kentucky law to pay an excise tax on all beer sold to licensed Kentucky wholesalers. The defendant, at all times in question, was obligated under Indiana law to have a uniform price for its beer sold to all licensed Indiana wholesalers. The defendant, at all times in question, was not obligated by any Kentucky law requiring a uniform price for its beer sold to licensed Kentucky wholesalers. The requirements by the States of Indiana and Kentucky in no way justify the discriminating price differential charged for beer by defendant to plaintiff, the defendant's Indiana wholesale distributor, and its Kentucky wholesale distributor, so situated in the same relevant geographic market area. The Indiana law did

not require the defendant to raise or lower its uniform sale price of beer in Indiana above or below the price defendant charged for beer sold to its wholesale distributors in the State of Kentucky. Such action of fixing its beer prices was defendant's own voluntary act. Defendant had the free choice of avoiding and/or not creating such discriminatory beer price differential to its wholesale distributors in the relevant geographic market area by either reducing the price or raising the price. The differences in the excise taxes of the States of Indiana and Kentucky and the passing on by defendant of such tax to its Indiana and Kentucky wholesale distributors are not the cause of nor did it contribute substantially to the discriminating price differential charged such distributors by defendant. The cost to the defendant of distributing its beer to its wholesalers did not contribute to the discriminating price differential charged such distributors by defendant, as defendant sold its beer F.O.B. defendant's facility at Louisville, Kentucky, as explained elsewhere in these findings.

The defendant collected the State of Indiana's excise tax on the beer sold to plaintiff for fifteen (15) years and paid the tax to the State of Indiana. The Indiana tax was based on a per gallon basis. From 1961 until October 1, 1973, the Indiana rate of tax was eight and three-quarter cents per gallon; and from October 1, 1973 to November 1, 1976, the Indiana rate of tax was nine and one-half cents per gallon. As previously found this tax was added to the price of the beer but defendant incorrectly added a greater amount of tax to the beer price for the fifteen (15) years and deceived plaintiff in such overcharge by means of defendant's method of doing business. The defendant did not market its packaged beer in gallon packages; did not deliver its beer to its wholesalers, and did not first invoice the office of its wholesalers for review and payment by the office staffs of its wholesalers. The plaintiff and all defendant's

wholesalers sent their trucks by their truck operators to defendant's facilities for their beer. Their truck operators also carried checks executed by plaintiff to defendant in blank so that payment could be made for the defendant's beer loaded on such trucks for the total price plus such tax as then and there invoiced by defendant to the truck operator. The responsibility was upon defendant for the preparation of such invoices for determining the charges on each individual load of beer. The purchaser was obligated to pay invoiced amounts less credits for returned bottles. On such invoice the defendant set out the price of the beer under column heading "Unit Price" and the amount of such tax under a column heading "Tax". The plaintiff relied entirely on defendant to correctly compute the amount of the tax by converting the tax from a gallon basis to a case basis and invoice such correct amount. The defendant knew such tax was overstated and unknown to plaintiff and overcharged the plaintiff. The overcharge of such tax first became known to plaintiff in the summer of 1976 and such discovery was called to defendant's attention as found previously in October of 1976. Plaintiff first became aware of such tax overcharge when plaintiff was preparing a statement of the differences in beer prices charged by defendant to defendant's wholesalers in Kentucky and Indiana.

Plaintiff has been injured in its business or property under the issues of count two of the complaint as amended. The plaintiff lost business because of the pricing practices of defendant. Plaintiff's loss of business due to such pricing by defendant was 45% to 50% of plaintiff's overall sales decline. While the defendant was suffering declining sales in the States of Indiana, Kentucky, and elsewhere during the relevant period in issue the plaintiff's declining sales due to its proximity to the State of Kentucky and defendant's disparity in pricing were far greater than the defendant's loss of sales in the State of Indiana by 15.12%. While the defendant's Henderson

County, State of Kentucky, distributor was suffering declining sales during the relevant period in issue the plaintiff's declining sales due to its proximity to the State of Kentucky and defendant's disparity in pricing were far greater than such Henderson County, State of Kentucky, distributor by 18.16%. The declining sales of defendant's beer brands in Vanderburgh County, State of Indiana, was due to several reasons which included the fact that there was a declining image of the defendant's brands of beer and the price differential between Henderson County, State of Kentucky, and Vanderburgh County, State of Indiana. Defendant did not do well in improving its image or financial position the last few years and some of such image loss was due to its own business judgment, including, but not limited to, its inappropriate advertising and defendant's marketing of a new brand of beer. In 1977 defendant entered into an agreement to pay a minimum of $50,000.00 a year for five (5) years commencing November 1, 1977 to Top Billing Inc. for its agreement with Billy Carter, the brother of the President of the United States of America, to endorse "Billy Beer", a new brand of beer of defendant. There is no other promotion expense of record but there obviously was, all of which turned out to be a failing promotion. In 1972 plaintiff incurred a loss of $72,448.00, and in 1973 plaintiff suffered a loss of $4,681.00. During the period 1972-1977, plaintiff incurred a loss of $323,800.00. An attempt was made to sell plaintiff as a going business in both 1973 and 1974. Pepsi General, a division of IC Industries offered $1,300,000.00 in 1973 to buy plaintiff. A group of citizens, including a Mr. Dauble, offered $1,100,000.00 in 1974 to buy plaintiff. Both offers were declined. In 1978 a sale discussion was underway and the prospective buyer appraised the goodwill of plaintiff as worthless.

The total amount by which defendant overcharged plaintiff from July 1, 1972 through November 30, 1978

is $575,293.79. Due to inflationary pressures in the relevant period in issue, the plaintiff needed a gross profit percentage of 26% to 28% in order to be profitable. Plaintiff was not profitable during the relevant period in issue unless it had a gross profit percentage of at least 27%. Decreases in plaintiff's gross profit percentage were, to a large degree, caused by absorption of price increases from defendant and other suppliers of plaintiff. Defendant's brands share of plaintiff's business was 72.3% in 1972, 54.6% in 1973, 47.3% in 1974, 44.8% in 1975, 47.2% in 1976 and 26.9% in 1977. The defendant's share of plaintiff's sales was a substantial amount, and that absorption of a price increase by defendant, in light of the percentage of plaintiff's beer sales of defendant's brands had a material impact on plaintiff's income. Plaintiff's absorption of price increases from defendant had a detrimental effect upon plaintiff's financial statement. The pattern of absorption of defendant's price increases clearly negates the defendant's claim that plaintiff passed on to retailers all of the overcharges. In 1973, after wage price controls imposed by the United States of America were terminated, plaintiff had to raise prices in order to cover built-in cost increases such as escalations in labor contracts that plaintiff incurred during the wage price control period. When defendant learned of plaintiff's intentions, defendant informed plaintiff that if plaintiff raised its prices the defendant would raise its prices and "take it away from you". In January of 1974, plaintiff raised prices and so did defendant, although by a lesser amount. Plaintiff was thus unable to cover all of the costs that necessitated the January, 1974, price increase. In July of 1974, the plaintiff again raised its prices, and the defendant also raised its prices. Thus, the plaintiff was still not able to recover all of the costs that necessitated the price increase. In January of 1975, the defendant raised prices on three of four package sizes, including cases of cans in 6 packs. Plaintiff did not raise

prices and fully absorbed the impact of defendant's price increase throughout the year 1975 as well as absorbing all other cost increases which occurred since July of 1974. In January of 1976, plaintiff raised its prices to its retailers and defendant raised its prices to plaintiff. Plaintiff's price increase was enough to cover the defendant's price increases of January, 1975 and 1976, but not enough to recoup its other cost increases. In July of 1976, plaintiff cut prices on three package sizes below prices in effect in July of 1974 and cut prices on one package size to the price in effect as of July, 1974. As a result, during the last six months of 1976, plaintiff was absorbing the impact of defendant's price increases in July, 1974, January, 1975, and January, 1976. In January 1977, plaintiff raised prices on the three package sizes which at that time had prices lower than the prices in effect as of July, 1974, up to the price level in effect as of July, 1974. Plaintiff continued to absorb the full impact of defendant's price increases of January, 1975, and January, 1976, until July, 1977. In July, 1977, plaintiff raised prices on all package sizes, and defendant raised prices to plaintiff on three of four package sizes. The plaintiff's price increase was not enough to offset defendant's price increase and plaintiff's other cost increases. The result of such absorption of defendant's price increases is reflected in plaintiff's yearly gross profit percentages. In 1971, plaintiff had a gross profit percentage of 24.9% and lost $3,000.00 on sales of $2,304,000.00. During 1972, a year in which federal wage and price controls were imposed, plaintiff's gross profit percentage was reduced to 23.9% because built-in costs continued to increase although plaintiff could not raise prices, and plaintiff lost $72,000.00 on sales of $2,227,000.00. In 1973, plaintiff's gross profit increased to 26.8%, even though plaintiff did not raise prices as plaintiff took on a new beer brand, "Busch", and was able to increase its sales volume while maintaining the same overhead. Plaintiff reduced its losses to $5,000.00

on sales of $2,490,000.00 in 1973. In 1974, even though plaintiff raised its price twice, plaintiff's gross profit increased by only 1.3% due to defendant's price increases and plaintiff's other cost increases. Plaintiff's operating income was $16,000.00 on sales of $2,731,000.00 in 1974. In 1975, when defendant increased its prices to plaintiff and plaintiff did not increase its prices, defendant's gross profit percentage decreased to 27.9% and plaintiff had an operating income of $4,000.00 on sales of $2,614,000.00. In 1976, when defendant increased its prices to plaintiff and plaintiff cut prices, the plaintiff's gross profit percentage decreased to 23.3% and plaintiff lost $218,000.00 on sales of $2,135,000.00. In 1977, when plaintiff raised prices and defendant raised its prices to plaintiff, the plaintiff's gross profit percentage increased only 1.5% to 24.8%, still below the break even percentage previously referred to.

Plaintiff seeks to attribute the found loss in value of the business to the defendant's found price differential. The Court is unable from the evidence to find any reasonable means of determining such result as the plaintiff also sold other brands of beer and all of such other suppliers of beer charged plaintiff more for such other beer than they charged to wholesalers in the State of Kentucky and plaintiff made more profit on defendant's brands of beer. Between 1970 and 1980 there was a substantial reduction in stockholder equity due to plaintiff's acquisition of outstanding stock of the plaintiff, a closely held family corporation. In such acquisition, the plaintiff was required to make payments on a promissory note of at least $41,000.00 for five (5) years. In 1977, an attorney for Vanco and others paid $200.00 per share for 900 shares of plaintiff's stock to plaintiff's principal executive (500 shares) and plaintiff (400 shares) and six months later the plaintiff bought such back for $200,000.00 thus depleting plaintiff's capital by $100,000.00. Interest expense to the plaintiff increased by $12,000.00 to

$13,000.00. In 1976, plaintiff increased the salary of its chief executive officer to $81,200.00, an increase of about 33%.

Brewers of beer, other than defendant, also established different F.O.B. brewery prices for their distributors or wholesalers in the State of Kentucky portion of the relevant geographic market area that were lower than their prices to their distributors or wholesalers in the State of Indiana portion of the relevant market area. There is no evidence that the defendant set its prices in such relevant geographic market area pursuant to an agreement with any other brewer of beer. There is no evidence that defendant and others, including wholesalers in Kentucky and brewers, engaged in an unlawful combination or conspiracy to unreasonably restrain trade and commerce in the sale of "Falls City Beer" and "Drummond Bros. Preferred Beer" in the relevant geographic market area, or attempted to monopolize the sale of such beer in such relevant geographic market area.

The Court has jurisdiction of the parties and subject matter of the actions stated in counts one and two of the complaint under Title 28 U.S.C. Section 1337. The Court has pendant jurisdiction of the parties and subject matter of the action stated in count three of the complaint.

The plaintiff has failed to prove the facts of each of the essential legal elements of the action stated in count one of the complaint as amended by a preponderance of the evidence.

There is some evidence of some similar pricing practices of other brewers when compared to plaintiff's practices as found; there is some evidence that the defendant sought assistance of the United States Brewers Association in defending the instant action; that defendant and other brewers resisted plaintiff's effort to obtain legislation before the Indiana General Assembly on the subject of differential pricing in adjoining States; and

there is evidence that wholesalers in the relevant geographic market area with less gross business benefited to the detriment of plaintiff and ultimate beer retailers and ultimate users by defendant's lower prices. The Court is mindful of the difficulty of proof facing plaintiff in proving the elements of count one, but as found, the above facts when considered with all of the direct evidence and circumstantial evidence do not support the alleged facts of each of the legal elements of count one.

The plaintiff has proved the facts of each of the essential legal elements of the action stated in count two of the complaint as amended by a preponderance of the evidence.

The defendant, as found, has engaged in interstate commerce in that it sold a substantial quantity of beer in issue in count two of the amended complaint that was manufactured in the State of Kentucky to wholesale distributors for use in States other than Kentucky, including the plaintiff, a wholesale distributor in Indiana.

The defendant, as found, has sold its beer of like grade and quality to plaintiff, a wholesaler, for higher prices than defendant, at the same time, or at reasonable contemporaneous times, charged defendant's wholesalers of beer in Kentucky, including Henderson County, Kentucky, since July 1, 1972 to and including November 30, 1978.

The defendant, as found, has knowingly sold its beer for use, consumption or resale within the United States, as defendant required disclosure by its customers obtaining delivery of beer at defendant's Louisville, Kentucky, facility of their State permits to sell beer, including all wholesale distributors in the thirteen States of the United States of America in which its beer was sold so that defendant knew the purchaser was buying beer for sale in a particular area in a particular State.

The defendant sold beer to plaintiff in the course of commerce and its beer sales to plaintiff were in interstate commerce under the following found facts:

The State of Indiana required brewers by IC 7.1-4-2-2 to pay a beer excise tax on the sale of beer by brewers to wholesale distributors within the State of Indiana; the defendant paid such tax to the State of Indiana upon all sales of beer by defendant to plaintiff that are in issue in this case and passed such excise tax on to plaintiff; defendant's agents traveled in Indiana servicing the wholesale and retail distributors of defendant's brands of beer; and defendant's agents traveled in Indiana in search of and obtaining the business of retailers for its brands of beer.

The substantial price discrimination as found of defendant to its Indiana and Kentucky beer wholesale distributors in the relevant geographic market area had a substantial adverse effect on competition in the relevant geographic market area in that it substantially lessened competition in the retail beer commerce between retailers in Indiana and Kentucky in the relevant geographic market area and injured and/or prevented competition between retailers of plaintiff, an Indiana wholesale distributor of defendant, and retailers of defendant's Kentucky wholesaler distributor in such market area.

The found facts clearly support the existence of damage, fact of damage, or the impact upon plaintiff, as distinguished from the extent of damage, to the plaintiff as it was overcharged by defendant in the sum of $575,293.79. The overcharge, as found, contributed to the reduction of Vanco's sales due to the lower prices charged to Falls City's Kentucky distributor which lower price reached the Kentucky retailers and diminished plaintiff's profits. Uncertainty as to the exact amount of the damage incurred by plaintiff from defendant's found price discrimination under the issues of count two of the complaint as amended does not defeat the found fact of damage to plaintiff, or impact on plaintiff.

The found facts do not support any finding that plaintiff raised its prices in response to, and in the amount of the overcharges of $575,293.79; that plaintiff's margin of profit and total sales had not thereafter declined; and that plaintiff could not or would not have raised its prices above the overcharge or maintained the high prices had the overcharge been discontinued.

The wrong as charged in count two of the complaint as amended proximately caused plaintiff to incur damages of $575,293.79, the amount of the defendant's overcharges for its beer sold to plaintiff over the prices charged by defendant to its Henderson County, State of Kentucky, distributor in the relevant geographic market area.

The defendant has failed to prove by a preponderance of the evidence the facts of the essential legal elements of the first affirmative defense of its amended answer to count two of the complaint as amended. The plaintiff has proved by a preponderance of the evidence the facts of each of the essential legal elements of the first affirmative defense of reply to the defendant's first affirmative defense of answer to the second count of complaint as amended.

The four (4) year statute of limitations (Title 15 U.S.C. Section 15b) was tolled for that period of loss to plaintiff from July 1, 1972 to December 28, 1972 (this action was commenced December 28, 1976) in issue under count two of the complaint as amended. The continuing violation by defendant of Title 15 U.S.C. Section 13(a) as alleged in count two of the complaint as amended, as found, was fraudulently concealed by defendant from plaintiff. As found, the first notice chargeable to plaintiff of such violation by defendant was the summer of 1974. This action was commenced on December 28, 1976.

The defendant has failed to prove by a preponderance of the evidence the facts of the essential legal elements of the second affirmative defense of the amended answer to count two of the complaint as amended.

The discriminatory prices of defendant were not made in good faith to meet an equally lower price of a brewery competitor as found. The defendant raised its prices to wholesale distributors in the State of Indiana, which included the plaintiff. It was done to obtain more profit for defendant. This is not a lowering of the price to meet a brewer competitor's price within the teaching of Title 15 U.S.C. Section 13(b) and at the same time leaving the price lower than Indiana's price to Kentucky distributors of defendant's beer in Henderson County, State of Kentucky. The defendant's pricing policy, as found, was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers as the Kentucky competitors had all kinds of prices. The lower price accorded defendant's Kentucky distributors of beer in the relevant geographic market area was not the result of a threat from such Kentucky wholesalers and distributors that they would buy their beer from other brewers or from other brewers selling beer at a lower wholesale price unless defendant adjusted its wholesale price of beer. Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant set its Indiana price higher than its Kentucky price for the sole reason that it followed the other brewers, or leaders of other beers, for its profit. It was not meeting competition, its action was to get a higher price in Indiana than in Kentucky. Defendant's lower price to Kentucky competitors of plaintiff was not due to any differences in cost of manufacture, sale, or delivery to Indiana and Kentucky distributors. Defendant's lower price to Kentucky competitors of plaintiff was not established or a change in response to changed conditions affecting the market for or the marketability of defendant's beer.

Defendant's claim that its pricing practices were commercially reasonable. This is no defense to the plaintiff's claims in count two of the complaint as amended. As found, the pricing practices were discriminatory and in violation of the Robinson-Patman Act.

The defendant has failed to prove by a preponderance of the evidence the facts of the essential legal elements of the third affirmative defense of the amended answer to count two of the complaint, as amended.

The differing statutory regulation of the beer industry, as found, in no way authorized defendant to violate the Clayton Act as amended by Section 2(a) of the Robinson-Patman Act in issue in count two of the amended complaint. The price differential charged by defendant to plaintiff over defendant's price charged to its Kentucky wholesaler in the relevant geographic market area was discriminatory. The Indiana law did not require defendant to raise or lower its uniform price of beer in Indiana above or below the price defendant charged its wholesalers in the State of Kentucky. The fixing of prices in Indiana and Kentucky was the voluntary act of defendant. The defendant had the free choice, as found, of avoiding and/or not creating such discriminatory price differential in the relevant geographic market area by either reducing or raising the price. The differences during the years in question in the amount of excise tax, if any, charged defendant by the States of Indiana and Kentucky and the passing on of such to the wholesalers in the respective States is not the cause of nor a substantial contributing factor to the discriminatory price differential. Furthermore, the cost of distribution to defendant was the same to defendant for sales to all Kentucky and Indiana wholesalers as the defendant's product was F.O.B. at defendant's facilities in Louisville, Kentucky.

The plaintiff has proved the facts of each of the essential legal elements of the action stated in count three of the complaint as amended by a preponderance of the evidence.

The defendant has failed to prove by a preponderance of the evidence the facts of the essential legal elements of each of the three alternative first affirmative defenses of the amended answer to count three of the complaint as amended. The plaintiff has proved by a preponderance of the evidence the facts of each of the essential legal elements of the first affirmative defense of reply to each of the three alternative defenses of the defendant's first affirmative defense of answer to the third count of the complaint as amended.

The four (4) year statute of limitations of the Kentucky Revised Statute (KRS 355.2-725(1)) or of the Indiana Code (IC 26-1-2-725(1)) pertaining to sale of goods and subject to the Uniform Commercial Code of those States was tolled for that period of overpayment of Indiana Excise Tax by plaintiff to defendant prior to December 28, 1972 in issue under count three of the complaint as amended if such issues were governed by such Uniform Commercial Codes of either of such States. The five (5) year statute of limitations of the State of Kentucky (KRS 413.120(1)) or the six (6) year statute of limitations of the State of Indiana (IC 34-1-2-1) pertaining to an action based on a contract partially in writing was tolled for that period of overpayment of Indiana Excise Tax by plaintiff to defendant prior to December 28, 1970 or December 28, 1971 (depending on the choice of which State law was applicable) in issue under count three of the complaint as amended if such issues were governed by such laws of either of such States and such action was based on a contract partially in writing. The five (5) year statute of limitations of the State of Kentucky (KRS 413.120(12)) pertaining to an action based upon payment of money by mistake was tolled for the period of overpayment of Indiana Excise Tax by plaintiff to defendant prior to December 28, 1971 in issue under count three of the complaint as amended if such issues were governed by such State's laws and such action was based on mistake.

The continuing wrongful overcharging by defendant of Indiana Excise Taxes to plaintiff and the payment thereof over a period of fifteen (15) years before November 5, 1976 was a continuing wrong as charged in count three of the complaint as amended, as found, was fraudulently concealed by defendant from plaintiff. As found, the first notice chargeable to plaintiff of such wrongful overcharge by defendant was the summer of 1976 when plaintiff began comparison of defendant's beer charges to wholesalers in Kentucky with defendant's beer charges to plaintiff. This action was commenced December 28, 1976. Defendant was notified by plaintiff in October, 1976, of such overcharge and immediately thereafter on November 5, 1976 changed its formula of Indiana Excise Tax charges to plaintiff.

Judgment

It is Adjudged that the plaintiff recover nothing under the issues of count one of the complaint as amended and count one of the complaint as amended be and is hereby Dismissed with prejudice.

It is also Adjudged that the defendant is indebted to the plaintiff under the issues of count two of the complaint in the sum of $1,725,881.37 which sum is treble the plaintiff's actual damages of $575,293.79. Judgment is hereby entered for the plaintiff and against the defendant in the amount of $1,725,881.37.

It is further Adjudged that the defendant is indebted to the plaintiff under the issues of count three of the complaint in the sum of $17,251.27 plus interest at the rate of 8% per annum upon each of the monthly overcharges of Indiana Excise Tax contained in plaintiff's Trial Exhibit 85A, attached hereto and made a part hereof. Judgment is hereby entered for the plaintiff and against the defendant in the amount of $17,251.27. The amount of the interest hereon is to be determined at the hearing on attorney's fees and costs.

It is also further Adjudged that the plaintiff is entitled to recover reasonable attorney fees under the issues of count two of the complaint as amended. However, in accordance with the motion of the plaintiff filed on March 24, 1980 for deferral of award of reasonable attorney's fees and expenses pending appeal of this case and this Court's entry of order granting this motion, the award of attorney's fees shall be deferred pending the appeal of this case.

The Court costs of the action are assessed against the defendant, such costs to be determined following the hearing on the award of reasonable attorney fees.

COMPARATIVE SALES OF FALLS CITY AND DRUMMOND BROS. PREFERRED BEER
BY VANCO BEVERAGE, INC. AND DAWSON SPRINGS BEVERAGE - E. UTLEY, JR., INC.
1972-1977

	Sales (Cases)	Gain/loss of sales from preceding year	Percentage of gain/ loss from 1972 sales	Percentage of gain/loss from preceding year
VANCO BEVERAGE, INC.				
1972	338,100	---	---	---
1973	280,310	(57,790)	-17.09%	-17.09%
1974	237,152	(43,158)	-29.85%	-15.4%
1975	198,006	(39,146)	-41.43%	-16.51%
1976	167,477	(30,529)	-50.47%	-15.42%
1977	142,722	(24,755)	-57.78%	-14.78%
	TOTAL	(195,378)		
DAWSON SPRINGS-UTLEY				
1972	62,189	---	---	---
1973	60,913	(1,276)	-2.05%	-2.05%
1974	63,066	2,153	41.4%	43.53%
1975	55,935	(8,031)	-10.06%	-12.73%
1976	47,630	(8,305)	-23.41%	-14.84%
1977	37,666	(9,964)	-39.43%	-20.92%
	TOTAL	(29,729)		
		35,423*		

* Computation errors corrected by counsel.

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COMPARISON OF SALES OF MILLER HIGH LIFE AND BUDWEISER BEER, PREFERRED BEER IN EVANSVILLE AND SELECTED INDIANA MARKETS
1972-1977

MARKET	1972	1973	1974	1975	1976	1977
EVANSVILLE						
Sales in Cases	351,498	269,430	240,051	197,142	165,515	
Percent of 1972	100	76.65	68.29	56.09	47.09	
ANDERSON						
Sales in Cases	39,015	37,895	26,424	29,219	14,989	
Percent of 1972	100	96.14	67.74	80.02	38.55	
CRAWFORDSVILLE						
Sales in Cases	11,515	12,066	13,075	9,611	7,105	
Percent of 1972	100	104.8	113.5	83.5	61.4	
FRANKFORT						
Sales in Cases	13,929	14,259	14,241	13,927	7,833	
Percent of 1972	100	102.4	103.3	97.1	56.2	
GREENCASTLE						
Sales in Cases	14,146	8,536	6,182	4,890	2,513	
Percent of 1972	100	76.6	43.7	43.9	22.5	
GREENFIELD						
Sales in Cases	7,896*	9,884	7,384	7,462	6,732	
Percent of 1972	100	125.2	93.5	94.5	85.9	
INDIANAPOLIS						
Sales in Cases	230,259	216,822	205,136	149,494	116,308	
Percent of 1972	100	94.16	90.00	65.01	50.56	
KOKOMO						
Sales in Cases	48,083	48,073	47,125	40,607	35,076	
Percent of 1972	100	99.98	98.01	84.45	72.95	
LAFAYETTE						
Sales in Cases	95,172	82,782	73,878	61,110	48,369	
Percent of 1972	100	86.98	77.63	64.20	50.82	45.74
LEBANON						
Sales in Cases	11,445	10,472	9,100	7,735	4,314	
Percent of 1972	100	91.5	79.5	67.6	55.2	
MUNCIE						
Sales in Cases	82,315	73,304	54,222	51,870	37,093	
Percent of 1972	100	89.16	65.93	63.09	45.12	
NOBLESVILLE						
Sales in Cases	15,134	11,653	12,278	10,122	7,483	
Percent of 1972	100	77.0	81.1	66.9	49.4	
PLAINFIELD						
Sales in Cases	11,595	12,159	11,676	6,195	7,791	
Percent of 1972	100	104.45	100.80	53.50	67.30	
SEYMOUR						
Sales in Cases	25,326	23,870	17,472	15,214	14,[illegible]	
Percent of 1972	100	94.25	68.99	60.09	57.00	
TOTAL SELECTED MARKETS						
Sales in Cases	592,720	551,869	479,413			
Percent of 1972	100	93.1	83.9	67.7		

*Largest sales were made in September, 1972. Accordingly, an annualized adjustment of three times actual 1972 sales of 2,632 or 7,896 was made in order to compute subsequent years' percentages of 1972 sales.

SALES TRENDS BY BRAND OF BEER SOLD BY
EVANSVILLE DISTRIBUTORS, 1972-1977
(FOR BRANDS HAVING 1% OR MORE OF MARKET)

1972				1973				1974			
RANK	BREWER	VOLUME	PERCENT OF MARKET	BREWER	VOLUME	PERCENT OF MARKET	BREWER	VOLUME	PERCENT OF MARKET
1	PABST	553255	30.0	PABST	562596	30.2	PABST	541963	32.0
2	FALLS CITY BREWING	353178	19.1	FALLS CITY BREWING	269430	14.5	HEILEMAN	256287	15.0
3	HEILEMAN	320261	17.3	HEILEMAN	268895	14.4	FALLS CITY BREWING	240493	14.0
4	FALSTAFF	128562	7.0	ANHEUSER-BUSCH	242485	13.0	ANHEUSER-BUSCH	234710	13.9
5	ANHEUSER-BUSCH	122988	6.9	STROHS	112871	6.3	STROHS	126600	7.4
6	STROHS	107132	5.8	WAGNER	106076	5.6	MILLER	71442	4.2
7	WIEDEMANN	67655	3.7	FALSTAFF	86140	4.6	SCHOENLING	65255	3.8
8	MILLER	63245	3.4	MILLER	65646	3.5	HAMM	49695	2.9
9	WAGNER	42000	2.3	WIEDEMANN	49322	2.7	SCHLITZ	23688	1.4
10	SCHLITZ	28028	1.5	SCHLITZ	24136	1.3	WIEDEMANN	22862	1.3
11	BUEKER	25168	1.4	SCHOENLING	23286	1.3	HUDEPOHL	19054	1.1
12	HAMM	24110	1.3						

1975				1976				1977			
RANK	BREWER	VOLUME	PERCENT OF MARKET	BREWER	VOLUME	PERCENT OF MARKET	BREWER	VOLUME	PERCENT OF MARKET
1	PABST	529662	29.2	PABST	495703	26.1	PABST	530867	26.4
2	HEILEMAN	400120	22.1	HEILEMAN	367312	19.3	MILLER	391722	19.5
3	ANHEUSER-BUSCH	239391	13.2	MILLERS	301723	15.9	HEILEMAN	362732	18.0
4	FALLS CITY BREWING	197162	10.9	STROHS	212819	11.2	STROHS	269969	13.4
5	STROHS	155653	8.6	ANHEUSER-BUSCH	179046	9.4	ANHEUSER-BUSCH	221222	11.0
6	MILLER	154008	8.5	FALLS CITY BREWING	176563	9.2	FALLS CITY BREWING	149864	7.4
7	SCHOENLING	29559	1.6	SCHLITZ	43452	2.3	SCHLITZ	36966	1.7
8	SCHLITZ	23618	1.3	PEIER HAND	35532	1.9			
9	WIEDEMANN	20191	1.1	SCHOENLING	30653	1.6			

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SOURCE: FC-I- F

COMPARISON OF SALES OF BRANDS OF BEER BY EVANSVILLE DISTRIBUTORS
1972 VERSUS 1977 (FOR BRANDS HAVING 1% OR MORE OF MARKET)

BRANDS	1972 RANK	1972 VOLUME	1972 PERCENT OF MARKET	1977 RANK	1977 VOLUME	1977 PERCENT OF MARKET	CHANGE IN MARKET SHARE FROM 1972	PERCENT INCREASE OR (DECREASE) OVER 1972 VOLUME
PABST	1	553255	30.0	1	530867	26.4	(3.6)	(4.1)
FALLS CITY BREWING	2	353178	19.1	6	149866	7.0	(11.7)	(57.6)
BELLEMAN	3	320261	17.3	3	342732	17.0	(.3)	7.0
FALSTAFF	4	128562	7.0	-				
ANHEUSER-BUSCH	5	127988	6.9	5	221222	11.0	4.1	72.9
STROHS	6	107132	5.8	4	269969	13.4	7.6	152.0
WIEDEMANN	7	67655	3.7	-				
MILLER	8	63245	3.4	2	391722	19.5	16.1	519.6
WAGNER	9	42000	2.3	-				
SCHLITZ	10	28028	1.5	7	34964	1.7	.2	24.7
BURGER	11	25168	1.4	-				
HAHN	12	24110	1.3	-				

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SOURCE: [illegible]

COMPARATIVE SALES OF EVANSVILLE DISTRIBUTOR (ALL BRANDS) 1972-1977

DISTRIBUTOR	1972	1973	1974	1975	1976	1977
CENTRAL BEVERAGE						
Withdrawals	205,867	165,505	123,738	171,341	324,233	407,660
Percent Market Share	11.1	8.9	7.2	9.5	17.1	20.3
% change over 1972 volume						98.0
BILL'S BEVERAGE						
Withdrawals	57,835	131,902	76,257	32,909	36,603	36,498
Percent Market Share	3.1	7.1	4.5	1.8	1.9	1.8
% change over 1972 volume						(36.9)
FOLKEI BEVERAGE						
Withdrawals	611,584	604,172	584,503	559,353	544,166	544,374
Percent Market Share	33.2	32.4	34.1	30.9	28.6	27.0
% change over 1972 volume						(11.3)
TRI-STATE						
Withdrawals	25,168	20,126	22,834	11,574	8,601	7,652
Percent Market Share	1.4	1.0	1.3	.6	.004	.004
% change over 1972 volume						(69.6)
WANCO BEVERAGE						
Withdrawals	497,178	521,471	497,448	439,373	360,421	563,714
Percent Market Share	26.9	28.0	29.1	24.3	19.0	28.0
% change over 1972 volume						13.4
WINKING BEVERAGE						
Withdrawals	157,549	160,844	166,727	201,159	267,030	338,578
Percent Market Share	8.5	8.7	9.7	11.1	14.1	16.9
% change over 1972 volume						114.9
EVANSVILLE CITY SALES						
Withdrawals	291,096	258,816	241,121	395,170	358,972	114,911
Percent Market Share	15.8	13.9	14.1	21.8	18.9	5.7
% change over 1972 volume						(60.5)
TOTAL WITHDRAWALS	1,848,777	1,862,836	1,712,628	1,811,079	1,900,046	2,013,387
TOTAL PERCENT CHANGE OVER 1972 VOLUME						8.9

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VANCO'S GROSS MARGIN ON FALLS CITY BEER - 1972-1977

SOURCE:

Date	Price to Retailer	F.O.B. Brewery*	Gross Marg
1/3/72			
Exp. 24/12	3.75	2.50	1.25
NR 24/12	4.30	3.16	1.14
24/12 6-pk cans	4.50	3.38	1.12
NR 12/32 Qts	4.75	3.50	1.25
7/3/72			
Exp. 24/12	3.75	2.50	1.25
NR 24/12	4.30	3.16	1.14
24/12 6-pk cans	4.50	3.38	1.12
NR 12/32 Qts	4.75	3.50	1.25
1/2/73			
Exp. 24/12	3.75	2.50	1.25
NR 24/12	4.30	3.16	1.14
24/12 6-pk cans	4.50	3.38	1.12
NR 12/32 Qts	4.75	3.50	1.25
7/2/73			
Exp. 24/12	3.75	2.50	1.25
NR 24/12	4.30	3.16	1.14
24/12 6-pk cans	4.50	3.38	1.12
NR 12/32 Qts	4.75	3.50	1.25
1/2/74			
Exp. 24/12	4.25	2.74	1.51
NR 24/12	4.80	3.40	1.40
24/12 6-pk cans	5.00	3.55	1.45
NR 12/32 Qts	5.25	3.72	1.53
7/5/74			
Exp. 24/12	4.85	3.10	1.75
NR 24/12	5.40	3.75	1.65
24/12 6-pk cans	5.60	3.90	1.70
NR 12/32 Qts	5.85	4.08	1.77
1/3/75			
Exp. 24/12	4.85	3.10	1.75
NR 24/12	5.40	3.81	1.59
24/12 6-pk cans	5.60	4.02	1.58
NR 12/32 Qts	5.85	4.20	1.65
7/1/75			
Exp. 24/12	4.85	3.10	1.75
NR 24/12	5.40	3.81	1.59
24/12 6-pk cans	5.60	4.02	1.58
NR 12/32 Qts	5.85	4.20	1.65
1/2/76			
Exp. 24/12	5.10	3.20	1.90
NR 24/12	5.65	3.93	1.72
24/12 6-pk cans	5.85	4.12	1.73
NR 12/32 Qts	6.10	4.35	1.75
7/1/76			
Exp. 24/12	4.85	3.20	1.60
NR 24/12	5.15	3.93	1.22
24/12 6-pk cans	5.35	4.12	1.23
NR 12/32 Qts	5.60	4.35	1.25
1/3/77			
Exp. 24/12	4.85	3.20	1.60
NR 24/12	5.40	~~3.93~~	~~1.47~~
24/12 6-pk cans	5.60	4.12	1.48
NR 12/32 Qts	5.85	4.35	1.50
7/1/77			
Exp. 24/12	5.25	3.20	2.05
NR 24/12	5.85	4.00	1.85
24/12 6-pk cans	5.95	4.22	1.73
NR 12/32 Qts	6.25	4.45	1.80

*price includes applicable state tax

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SOURCE: FC-I-1
FC-I-2

UTLEY-DAWSON SPRINGS
GROSS MARGIN ON FALLS CITY BEER - 1972-1977

Date	Price to Retailer	F.O.B. Brewery*	Gross Margin
1/2/72			
Exp. 24/12	3.50	2.12	1.38
NR 24/12	4.15	2.81	1.34
24/12 6-pk cans	3.95	3.01	.94
NR 12/32 Qts	4.50	3.03	1.47
7/3/72			
Exp. 24/12	3.50	2.12	1.38
NR 24/12	4.15	2.81	1.34
24/12 6-pk cans	3.95	3.01	.94
NR 12/32 Qts	4.50	3.03	1.47
1/2/73			
Exp. 24/12	3.50	2.12	1.38
NR 24/12	3.95	2.81	1.14
24/12 6-pk cans	4.15	3.01	1.14
NR 12/32 Qts	5.25	3.03	2.22
7/2/73			
Exp. 24/12	3.50	2.12	1.38
NR 24/12	3.95	2.81	1.14
24/12 6-pk cans	4.15	3.01	1.14
NR 12/32 Qts	5.25	3.03	2.22
1/2/74			
Exp. 24/12	3.50	2.12	1.38
NR 24/12	3.95	2.81	1.14
24/12 6-pk cans	4.15	3.01	1.14
NR 12/32 Qts	5.25	3.03	2.22
7/5/74			
Exp. 24/12	3.50	2.45	1.05
NR 24/12	3.95	3.15	.80
24/12 6-pk cans	4.15	3.35	.80
NR 12/32 Qts	5.25	3.40	1.85
1/3/75 **			
Exp. 24/12	4.25	2.60	1.65
NR 24/12	4.60	3.30	1.30
24/12 6-pk cans	4.80	3.50	1.30
NR 12/32	5.50	3.55	1.95
7/1/75			
Exp. 24/12	4.25	2.60	1.65
NR 24/12	4.90	3.30	1.60
24/12 6-pk cans	4.80	3.50	1.30
NR 12/32 Qts	5.25	3.55	1.70
1/2/76			
Exp. 24/12	4.55	2.90	1.65
NR 24/12	4.90	3.42	1.48
24/12 6-pk cans	5.10	3.62	1.48
NR 12/32	5.75	3.80	1.95
7/1/76			
Exp. 24/12	4.55	2.90	1.65
NR 24/12	4.90	3.42	1.48
24/12 6-pk cans	5.10	3.62	1.48
NR 12/32	5.75	3.80	1.95
1/3/77			
Exp. 24/12	4.55	2.90	1.65
NR 24/12	4.90	3.42	1.48
24/12 6-pk cans	5.10	3.62	1.48
NR 12/32 Qts	5.75	3.80	1.95
7/1/77			
Exp. 24/12	4.55	2.90	1.65
NR 24/12	4.90	3.50	1.40
24/12 6-pk cans	5.10	3.72	1.38
NR 12/32 Qts	5.75	3.96	1.79

*price includes applicable state tax
** price increase actually occurred in September, 1974.

FC-VI-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

No. EV 76-170-C

VANCO BEVERAGE, INC.,
Plaintiff,

v.

FALLS CITY BREWING CO.,
Defendant.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANT FALLS CITY BREWING COMPANY

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28. Because of the different competitive conditions that prevailed, Falls City, at all relevant times, charged higher prices for beer sold to Indiana wholesalers than for beer sold to Kentucky distributors. (Tate TR at 945).

29. All other brewers selling to both Indiana and Kentucky distributors also charged higher prices to their Indiana distributors than to their Kentucky distributors. (Tate TR at 948-49). For example, as shown on the following table, Anheuser-Busch sold its brands of beer to Vanco at higher f.o.b. prices than it charged Dawson Springs:

Date	Product	Price to Vanco	Price to Dawson Springs	Per Case Differential	Source
1/18-19/74	Busch 24/12	$3.284	$3.091	$.193	DTX-64; PTX-110
6/19/74	Busch 24/12 NR 3/8	3.814	2.901	.913	DTX-64; DTX-29
1/27, 31/76	Busch 24/12 NR 4/6	3.994	3.711	.283	DTX-64; DTX-32
6/17, 19/74	Budweiser 24/12 NR 4/6	4.144	3.501	.643	DTX-63; DTX-29
6/17, 19/74	Budweiser 24/12 Cans 4/6	4.254	3.531	.723	DTX-63; DTX-29
7/4-5/77	Budweiser 24/16 Cans 4/6	5.715	5.182	.533	DTX-64; DTX-35
6/19/74	Michelob 24/12 NR	4.814	4.361	.453	DTX-63; DTX-29
7/4-5/77	Michelob 24/12 Cans	5.104	4.751	.353	DTX-64; DTX-35

30. Falls City endeavored to keep abreast of its competitors' prices. For example, in 1972 the Kentucky Alcoholic Beverage Commission required brewers to submit price schedules, and Falls City obtained those schedules. (DTX-28). At other times, Falls City learned of its competitors' prices from information obtained by its salesmen from distributors, many of which also handle competing beers. (Tate TR at 935-36).

31. Mr. Tate, Falls City's president, personally examined the price schedules submitted to the Kentucky

Alcoholic Beverage Commission for the purpose of comparing Falls City's prices with the prices of Strohs, Pabst and Sterling. (DTX-28; Tate TR at 951-52). Notes made by Mr. Tate on these schedules show that the Kentucky prices of Strohs were less than those of Falls City and that prices of Pabst and Sterling were in some cases higher and in some cases lower than Falls City's. (DTX-28, Tate TR at 950-51).

32. Examination of Henderson, Kentucky, prices shows Falls City's prices to be competitive with those of its two chief rivals—Pabst and Strohs. As shown in the following table, Falls City's Kentucky f.o.b. prices were slightly higher on some packages and slightly lower on others than the f.o.b. prices Pabst and Strohs charged Henderson distributors. In no instance was Falls City's price below the Henderson price of both its competitors.

	24/12 Ret.	12/32 Ret.	24/12 Cans	12/12 Cans	41/24 Cans 4/6	
Falls City	2.12	2.67	2.91	1.495	3.01	
Pabst	2.20	2.65	2.96	1.48	3.00	
Strohs	1.88	2.54	2.87	2.87*	2.87	
	16/24 Cans 4/6	24/12 Cans 4/6	24/12 NR 4/6	12/32 NR	1/2 BBL	1/4 BBL
Falls City	3.70	2.81	2.81	3.03	11.00	5.75
Pabst	3.70	2.70	2.70	2.96	11.25	5.75
Strohs (DTX-28).	3.63	2.58	2.58	3.07	11.00	6.00

* Strohs apparently reported the price of a case of two 12-packs rather than one 12-pack.

33. The record shows that Falls City's Indiana f.o.b. prices were generally *below* those of its principal competitors. As shown in the table below, which lists f.o.b. brewery prices as of February 14, 1974, October 15, 1975, and March 5, 1976, Vanco's price for Falls City was in most cases below the f.o.b. prices for other beers, including the price Vanco was paying to Anheuser-Busch for Busch:

	24/12 Ret.	12/32 NR	12/12 Cans	24/12 Cans	24/16 Cans	24/12 NR 4/6	24/12 NR 3/8	1/2 BBL.	1/4 BBL.
2/14/74									
Falls City and Drummond Bros.	2.74	3.72	1.75	3.55	—	3.40	3.40	14.02	7.11
Busch	2.634	3.685	1.767	3.584	—	3.264	3.264	14.17	—
Pabst	2.784	3.815	1.774	3.624	—	3.464	3.464	14.17	—
Sterling	2.634	3.735	1.787	3.584	—	3.414	3.414	13.07	6.74
Strohs	2.767	3.747	1.785	3.577	—	3.427	3.427	14.218	7.619
10/15/75									
Falls City and Drummond Bros.	3.10	4.20	2.01	4.02	—	3.81	3.81	16.02	8.11
Busch	3.034	4.155	2.007	4.054	—	3.874	3.874	16.673	—
Pabst	3.134	4.165	1.944	3.974	—	3.814	3.814	16.173	8.337
Sterling	3.134	4.165	1.947	3.974	—	3.814	3.814	16.223	8.73
Strohs	3.11	4.095	1.9625	3.925	—	3.785	3.785	16.217	10.12
3/5/76									
Falls City	3.20	4.35	2.06	4.12	5.00	3.93	3.93	16.60	8.40
Drummond Bros.	3.10	—	2.01	4.02	—	—	3.81	16.02	8.11
Busch	3.394	4.375	2.067	4.174	5.235	3.994	3.994	17.175	—
Pabst	3.234	4.335	1.997	4.054	5.155	3.894	3.894	16.673	8.587
Sterling	3.234	4.335	2.007	4.094	5.18	3.894	3.894	16.823	9.756
Strohs	3.21	4.265	2.0025	4.005	5.22	3.864	3.864	16.817	10.42

(PTX-231).

34. Given the requirements of Indiana law and the pricing structure established by Falls City's larger competitors, it would have been commercially unreasonable for Falls City to have charged Vanco and Dawson Springs the same prices. Reducing its price to Vanco to the Kentucky level would have placed Falls City appreciably below prices being charged to Indiana distributors by its competitors. This includes, specifically, the prices being charged to Vanco by Anheuser-Busch. In addition, such reduction could not have been limited to Vanco, but because of the requirements of Indiana law, Falls City would have had to sell to all Indiana distributors at the same reduced price. The result would have been a substantial loss of revenue which would have hastened Falls City's termination of brewery operations. (Tate TR at 946-47).

35. Likewise, it would have been commercially unreasonable for Falls City to increase its f.o.b. price for Dawson Springs to the Indiana level. This would have placed it above the prices being charged to Henderson distributors by its competitors, including the price being charged to Dawson Springs by Anheuser-Busch. (Tate TR at 945).

* * * *

Joint Appendix

Office - Supreme Court, U.S.
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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 7, 1982
CERTIORARI GRANTED MARCH 1, 1982

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ITEMS APPEARING IN THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

The below-listed portions of the record are set forth in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, at the pages indicated. The parties incorporate these portions by reference into this appendix and respectfully recall them to the attention of the Court.

Opinion of the Court of Appeals (July 15, 1981) .. 1a

Opinion of the District Court (April 14, 1980) 18a

Defendant's Trial Exhibit 51 ..... 54a

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Defendant's Proposed Findings of Fact and Conclusions of Law 61a

SELECTED DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS
7/17/78	Pltf. fi Second Request for Production of Documents; c/s.
7/31/78	Pltf. fi Motion to Compel Compliance with Deposition Subpoena to United States Brewers Association, Inc., dated July 17, 1978, with supporting brief; c/s.
	* * * *
8/ /78	Deft., Falls City Brewing Co., fi Response and Objections to Pltf's. Second Request for Production of Documents; c/s.
8/29/78	Pltf. and United States Brewers Association fi stip. for ext. of time for USBA to respond to pltf's. mo. to compel discovery.
8/30/78	United States Brewers Association fi Response to Motion to Compel Production of Documents Pursuant to Subpoena Dated July 17, 1978; c/s. USBA also fi Response and Objections to Subpoena for Taking Deposition dated July 17, 1978; c/s.
9/5/78	Pltf. fi Response of United States Brewers Association to Mo. to compel Production of Documents Pursuant to Subpoena Dated 7/17/78; c/s.
9/11/78	United States Brewers Association fi Supplement to their Response to Motion to Compel Production of Documents Pursuant to Subpoena Dated 7/17/78.
9/20/78	Pltf. fi Reply To Deft's. Response and Objections to Pltf's. Second Request for Production of Documents; p/s. Pltf. fi mo. to compel Compliance with Second Request for Production of Documents. p/s.

DATE	PROCEEDINGS
9/25/78	Plaintiff fi Supplement to Reply to Response of United States Brewers Association to Motion to Compel Production of Documents Pursuant to Subpoena dated July 17, 1978; c/s.
9/25/78	Court files entry referring motions to compel to the Magistrate for hearings.
10/ /78	Deft., Falls City Brewing Co., fi Memorandum in Opposition to Plaintiff's Motion to Compel Production; c/s.
	* * * *
4/9/79	Agreements & Order with respect to subpoena to U.S. Brewers dated 7/17/78. filed.
	* * * *
5/4/79	Pltf. fi mo. to supplement its list of witnesses; c/s. Pltf. fi. response to deft's. mo. to compel discovery and to supplement its trial witness list; c/s. Pltf. fi report to court and mo. to reconsider agreements and order with respect to subpoena to U.S. Assn. dated 7/17/78.
5/10/79	Atty., Charles E. Buffon, fi. affidavit in opposition to pltf's. mo. to amend the April 19, 1979 order of Magistrate Godich.
5/11/79	David Finney and U.S. Brewers Assn. fi response to subpoena served 5/9/7...
	* * * *
5/17/79	Trial resumed. Evidence on behalf of the plaintiff is resumed and continued until tomorrow. Mr. Austern, attorney for Mr. Finney files letter withdrawing objections to subpoenas.

AMENDED COMPLAINT AND ANSWER, AS FUTHER AMENDED AT PRETRIAL CONFERENCE

COUNT I

Jurisdiction and Venue

Paragraph 1 of Count I:

This is a civil action for treble damages and injunctive relief arising under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) and Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2). This Court has jurisdiction under 28 U.S.C. § 1337.

Answer to Paragraph 1 of Count I:

Falls City admits all allegations contained in paragraph 1.

Paragraph 2 of Count I:

Venue is proper in this district under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15, 22) since Defendant resides in, is found in, has an agent in, or transacts substantial business in, this judicial district. Moreover, the acts in violation of the antitrust laws alleged herein have been and are being carried out, and have had effect within, this judicial district.

Answer to Paragraph 2 of Count I:

Falls City admits the allegations in paragraph 2, with the qualification that Defendant reserves its rights to preserve the record regarding the Court's denial of Defendant's Motion to Dismiss addressed to the issue of venue.

The Parties

Paragraph 3 of Count I:

Plaintiff, VANCO BEVERAGE, INC. ("VANCO") is an Indiana corporation which distributes, among other

beers, the beer products brewed by Defendant, FALLS CITY and is now, and has been for many years, FALL CITY'S only distributor in Vanderburgh County, Indiana.

Answer to Paragraph 3 of Count I:

Falls City admits the allegations in paragraph 3.

Paragraph 4 of Count I:

Defendant, FALLS CITY BREWING CO. ("FALLS CITY") is a Kentucky corporation which brews from its brewery located in Louisville, Kentucky, beer under the labels "Falls City Beer" and "Drummond Bros. Preferred Beer."

Answer to Paragraph 4 of Count I:

Falls City admits the allegations in paragraph 4.

Paragraph 5 of Count I:

There is only one grade and quality of beer for each of such brands brewed and sold by Falls City which is sold in at least the following sizes and types of containers:

(a) Cases of 24/12 ounce Exports (i.e. returnable bottles);

(b) Cases of 24/12 ounce Cans in 12 packs;

(c) Cases of 24/12 ounce Cans in 6 packs;

(d) Cases of 24/12 ounce No Return Pints;

(e) Cases of 12/32 ounce No Return Quarts;

(f) 1/2 Barrels; and

(g) 1/4 Barrels.

Answer to Paragraph 5 of Count I:

Falls City admits the allegations contained in paragraph 5.

Co-Conspirators

Paragraph 6 of Count I:

Various corporations, firms and individuals, including various beer wholesalers located in Kentucky, not named as Defendants in this complaint, participated as co-conspirators in the offense charged and performed acts and made statements in furtherance thereof. [The pre-trial entry notes that the alleged co-conspirators consist of the United States Brewing Association and all beer wholesalers in the Commonwealth of Kentucky.]

Answer to Paragraph 6 of Count I:

Falls City denies the allegation in paragraph 6.

Interstate Commerce

Paragraph 7 of Count I:

Defendant FALLS CITY is engaged in interstate commerce in that Defendant sells a substantial quantity of beer brewed in Kentucky to wholesale distributors, including Plaintiff VANCO, located in Indiana. Furthermore, interstate commerce has been and is affected and restrained by the violations herein alleged. The offenses charged herein occurred in the course of Defendant's interstate business, namely, sales to Indiana distributors.

Answer to Paragraph 7 of Complaint:

Falls City admits the first sentence of Paragraph 7, and denies all other allegations of paragraph 7.

Market Involved

Paragraph 8 of Count I:

The United States Department of Commerce, Bureau of Labor Statistics, has denominated Vanderburgh, Warrick and Posey Counties, Indiana, and Henderson County,

Kentucky, as a single district for the reporting of labor employment statistics and the United States Government considers these counties to be a single metropolitan area. Furthermore, television and media also consider these counties to be a unified marketing area. Lastly, FALLS CITY has employed television and radio media, to appeal to the marketing areas comprised of at least Vanderburgh, Warrick and Posey Counties, Indiana, and Henderson County, Kentucky, and other areas.

Answer to Paragraph 8 of Count I:

Falls City admits "The United States Department of Commerce, Bureau of Labor Statistics, has denominated Vanderburgh, Warrick and Posey Counties, Indiana, and Henderson County, Kentucky as a single district for the reporting of labor employment statistics," and denies the remaining allegations of the first sentence. The defendant further states it lacks sufficient information and knowledge to form a belief as to the allegation in the second sentence. The defendant admits all allegations contained in the last sentence of paragraph 8, excepting the word "marketing."

Paragraph 9 of Count I:

Vanderburgh, Warrick and Posey Counties, Indiana, and Henderson County, Kentucky, form a unified and functional, relevant product market area (hereinafter referred to as "the relevant geographic market area") in which wholesalers located in both Indiana and Kentucky compete for sales of "Falls City Beer" and "Drummond Bros. Preferred Beer" to retailers located in the relevant geographic market area, and in which retailers compete for sales of "Falls City Beer" and "Drummond Bros. Preferred Beer" to consumers living in this relevant geographic market area. Defendant FALLS CITY'S discriminatory pricing policies have resulted in lower retail prices for "Falls City Beer" and "Drummond

Bros. Preferred Beer" in the Kentucky portion of the relevant geographic market area than in the Indiana portion of the same market. Attracted by these lower retail prices, great numbers of consumers living on the Indiana side of the market who would otherwise purchase their beer in Indiana frequently make their purchases of "Falls City Beer" and "Drummond Bros. Preferred Beer" from retailers located on the Kentucky side of the market.

Answer to Paragraph 9 of Count I:

Falls City denies the allegations contained in paragraph 9.

Offense Charged

Paragraph 10 of Count I:

Since at least July 1, 1972, and continuing up to and including the date of the filing of this complaint, Defendant FALLS CITY and co-conspirators have engaged in an unlawful combination and conspiracy to unreasonably restrain trade and commerce in the sale of "Falls City Beer" and "Drummond Bros. Preferred Beer" in and between the states of Indiana and Kentucky in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and have attempted to monopolize and conspired to monopolize the sale of "Falls City Beer" and "Drummond Bros. Preferred Beer" in the relevant geographic market areas in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

Answer to Paragraph 10 of Count I:

Falls City denies the allegations contained in paragraph 10.

Paragraph 11 of Count I:

The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and conspiracy

among Defendant FALLS CITY and co-conspirators to increase the position of Kentucky wholesalers in the relevant geographic market area, to eliminate competition between Kentucky wholesalers and Plaintiff VANCO, to prevent Plaintiff VANCO from becoming a substantial competitor therein, to eliminate Plaintiff VANCO from the relevant geographic market area, and to attempt to monopolize trade and commerce in "Falls City Beer" and "Drummond Bros. Preferred Beer" in the relevant geographic market area.

Answer to Paragraph 11 of Count I:

Falls City denies the allegation contained in paragraph 11.

Paragraph 12 of Count I:

Falls City has sold "Falls City Beer" and "Drummond Bros. Preferred Beer" in the containers described in paragraph 5 to wholesalers in Kentucky and at the same time, or at reasonably contemporaneous times, Falls City has sold quantities of "Falls City Beer" and "Drummond Bros. Preferred Beer" in these containers to Vanco. Since at least July 1, 1972 Falls City has offered and granted to wholesalers in Kentucky lower prices for "Falls City Beer" and "Drummond Bros. Preferred Beer" than the prices offered and granted to Vanco.

Answer to Paragraph 12 of Count I:

Falls City admits the allegations of paragraph 12.

Paragraph 13 of Count I:

As a result of Defendant FALLS CITY'S violations, Plaintiff VANCO has paid higher prices for "Falls City Beer" and "Drummond Bros. Preferred Beer" than Kentucky wholesalers have paid. Because consumers have bought less "Falls City Beer" and "Drummond Bros. Preferred Beer" from Indiana retailers than they

would have bought if not for the fact that the aforesaid combination and conspiracy has resulted in higher retail prices in Indiana, Indiana retailers have bought less "Falls City Beer" and "Drummond Bros. Preferred Beer" from Plaintiff VANCO than they would have bought, but for the higher retail prices. As a result, Plaintiff VANCO has been injured and damaged by Defendants in the amount of Five Hundred Seventy Five Thousand Dollars ($575,000.00) and in the amount of Seven Hundred Sixty-Six Thousand Dollars ($766,000.00), as reflected in the dimunition of value of the corporate plaintiff, each of which amounts reflects the damages allegedly sustained as of October 17, 1978.

Answer to Paragraph 13 of Count I:

Falls City admits "Vanco has paid higher prices for 'Falls City Beer' and 'Drummond Bros. Preferred Beer' than Kentucky wholesalers have paid." Defendant denies all other allegations of paragraph 13 of Count I.

COUNT II

Jurisdiction and Venue

Paragraph 1 of Count II:

This is a civil action for treble damages arising under Sections 2, 4 and 16 of the Clayton Act (15 U.S.C. §§ 13, 15, 26). This Court has jurisdiction under 28 U.S.C. § 1337.

Answer to Paragraph 1 of Count II:

Falls City admits the allegations contained in paragraph 1.

Paragraph 2 of Count II:

Plaintiff realleges paragraph 2 of Count I.

Answer to Paragraph 2 of Count II:

Falls City realleges and reaffirms herein the answers to Count I set forth above, as to the reallegations stated by Plaintiff in its Count II, including paragraph 2 of Count I.

The Parties

Paragraph 3 of Count II:

Plaintiff realleges paragraphs 3, 4 and 5 of Count I.

Answer to Paragraph 3 of Count II:

Falls City realleges and reconfirms herein the answers to Count I set forth above as to the reallegations stated by Plaintiff in its Count II, including Paragraph 3 of Count II.

Interstate Commerce

Paragraph 4 of Count II:

Defendant FALLS CITY is engaged in interstate commerce in that Defendant sells beer brewed in Kentucky to wholesale distributors, including Plaintiff VANCO, located in Indiana. The offense charged herein occurred in the course of Defendant's interstate business, namely, sales to Indiana distributors. The discriminatory sales made by Defendant across state lines constitute a substantial volume of Defendant's sales and are in excess of $600,000 per year.

Answer to Paragraph 4 of Count II:

Falls City admits the first sentence of paragraph 4 and denies all other allegations of paragraph 4.

Market Involved

Paragraph 5 of Count II:

Plaintiff realleges paragraphs 8 and 9 of Count I.

Answer to Paragraph 5 of Count II:

Falls City realleges and reaffirms herein the answers to Count I set forth above, as to the reallegations stated by Plaintiff in its Count II, including paragraph 5 of Count II.

Offense Charged

Paragraph 6 of Count II:

Since at least July 1, 1972, Defendant FALLS CITY has sold and continues to sell "Falls City Beer" and "Drummond Bros. Preferred Beer" in the containers described in paragraph 5 to wholesalers in Kentucky, who compete for retail business in the relevant geographic market area. At the same time, or at reasonably contemporaneous times, since July 1, 1972, Defendant FALLS CITY has sold, and continues to sell, "Falls City Beer" and "Drummond Bros. Preferred Beer" in these containers to Plaintiff VANCO, who also competes for retail business in the relevant geographic market area. Plaintiff VANCO has purchased thousands of cases and barrels of "Falls City Beer" and "Drummond Bros. Preferred Beer" from Defendant FALLS CITY since July 1, 1972.

Answer to Paragraph 6 of Count II:

Falls City denies the allegations contained in paragraph 6 of Count II.

Paragraph 7 of Count II:

Since at least July 1, 1972, Defendant FALLS CITY has sold, and continues to sell "Falls City Beer" and "Drummond Bros. Preferred Beer" to wholesalers in Kentucky at a lower price than to Plaintiff VANCO, despite the fact that Kentucky wholesalers and Plaintiff VANCO have directly competed, and continue to directly compete in the same relevant geographic market area, in violation of Section 2(a) of the Robinson-Patman Act,

an amendment to the Clayton Act. Defendant FALLS CITY has sold its products at a lower price to Kentucky wholesalers without regard to cost savings. The lower price offered to Kentucky wholesalers cannot be attributed to differences in costs of delivery since the higher price charged to Plaintiff VANCO is F.O.B. Defendant's brewery in Louisville, Kentucky. Defendant FALLS CITY sells "Falls City Beer" and "Drummond Bros. Preferred Beer" to all Kentucky wholesalers at the same price, which is lower than the price at which Defendant FALLS CITY sells to Plaintiff VANCO. Since July 1, 1972, and continuing until the present time, Plaintiff VANCO has paid approximately $575,000.00, as of October 17, 1978, more for "Falls City Beer" than wholesalers in Kentucky with whom Plaintiff VANCO is in direct competition.

Answer to Paragraph 7 of Count II:

Falls City admits that "Falls City, when in business, sold 'Falls City Beer' and Drummond Bros. Preferred Beer' to wholesalers in Kentucky at a lower price than to Vanco," and denies the remaining allegations of the first sentence of paragraph 7. Defendant admits the second and third sentences of paragraph 7, and denies all remaining allegations of paragraph 7.

Paragraph 8 of Count II:

As a result of price discrimination, Plaintiff VANCO has been injured in that Plaintiff VANCO has been and continues to be unable to effectively compete with Kentucky wholesalers in the relevant geographic product market. Because consumers have bought less "Falls City Beer" and "Drummond Bros. Preferred Beer" from Indiana retailers than they would have bought if not for the fact that Defendant's discriminatory pricing policies have resulted in higher retail prices, Indiana retailers have bought less "Falls City Beer" and "Drummond Bros. Preferred Beer" from Plaintiff VANCO than they would have bought, but for the price differential.

Answer to Paragraph 8 of Count II:

Falls City denies the allegations contained in paragraph 8 of Count II.

COUNT III

Paragraph 1 of Count III:

Jurisdiction is conferred on this court by virtue of the doctrine of pendent jurisdiction.

Answer to Paragraph 1 of Count III:

1. Falls City denies the allegation contained in paragraph 1 of Count III.

2. The Court lacks personal jurisdiction over this defendant and subject matter jurisdiction over the alleged claim set forth herein.

Paragraph 2 of Count III:

Plaintiff realleges paragraph 2 of Count I.

Answer to Paragraph 2 of Count III:

1. Falls City denies the allegations contained in paragraph 2 of Count III.

2. The Court lacks personal jurisdiction over this defendant and subject matter jurisdiction over the alleged claim set forth herein.

Paragraph 3 of Count III:

Since at least 1961, and continuing through and including the date of the filing of the complaint, Defendant FALLS CITY has overcharged Plaintiff VANCO for Indiana State Beer Tax by an amount in excess of $17,000.00.

Answer to Paragraph 3 of Count III:

1. Falls City denies the allegation contained in paragraph 3 of Count III.

2. The Court lacks personal jurisdiction over this defendant and subject matter jurisdiction over the alleged claim set forth herein.

Paragraph 4 of Count III:

Defendant Falls City has not paid these overcharges collected from Plaintiff to the State of Indiana, but instead has retained these funds for its own use, and has been unjustly enriched thereby.

Answer to Paragraph 4 of Count III:

1. Falls City denies the allegation contained in paragraph 4 of Count III.

2. The Court lacks personal jurisdiction over this Defendant and subject matter jurisdiction over the alleged claim set forth herein.

Prayer for Relief

WHEREFORE, Plaintiff VANCO, prays as to Counts I, II and III above:

1. That a permanent injunction be entered restraining and enjoining Defendant FALLS CITY from selling its products to wholesalers in Kentucky at a lower price than to Plaintiff VANCO and from overcharging Plaintiff VANCO for taxes collected but not paid to the State of Indiana.

2. That Plaintiff VANCO be awarded the amount of damages suffered by it as a result of the violations of the antitrust laws alleged herein, that this amount be trebled as required by Section 4 of the Clayton Act, and that reasonable attorneys' fees and costs be awarded to Plaintiff.

3. That Defendant FALLS CITY be ordered to return to Plaintiff VANCO the amount of state tax overcharges collected from Plaintiff.

4. That the Court award such other and further relief as it deems proper.

Answer to Prayer for Relief:

WHEREFORE, Defendant prays: that the complaint be dismissed against it; for its costs herein expended and for all other relief to which it may be entitled.

PLAINTIFF'S SUPPLEMENTAL COMPLAINT

[filed first day of trial May 15, 1979]

Paragraphs 1, 2 and 3 of Supplemental Complaint:

1. Plaintiff incorporates herein by reference each of the allegations contained in its First Amended Complaint, filed on November 30, 1977, as though fully set forth herein.

2. Plaintiff avers that defendant's violations as alleged by plaintiff in this action have continued from the commencement of said action to the present date.

3. Plaintiff avers that damages to its business and property as a result of defendant's violations have continued to accrue from the commencement of said action to the present date.

Answer to Paragraphs 1, 2 and 3 of Supplemental Complaint:

1. Falls City denies each and every allegation contained in numerical paragraphs 1, 2 and 3.

2. It incorporates by reference each and every allegation and defense set forth in its Answer to the Complaint and Answer to the First Amended Complaint, as if set forth in full herein.

Prayer for Relief:

WHEREFORE, plaintiff prays:

A. That the conduct of defendant as alleged be adjudged and decreed unlawful.

B. That judgment be entered against defendant for treble the amount of damages suffered by plaintiff as a result of the violations of the antitrust laws alleged herein and for attorneys' fees and costs as required by Section 4 of the Clayton Act.

C. That the injunctive relief requested in plaintiff's First Amended Complaint be granted to the extent justified by the proof.

D. That the Court award such other and further relief as it deems proper.

Answer to Prayer for Relief:

WHEREFORE, Falls City Brewing Co., prays that the Complaint, First Amended Complaint and Supplemental Complaint be dismissed at Plaintiff's costs, and for all other relief to which it may be entitled.

DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES AND ANSWERS

COUNTS I AND II

Paragraph 1:

Counts I and II of Plaintiff's Complaint alleges violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2) and Section 2 of the Clayton Act (15 U.S.C. § 13), respectively.

Answer to Paragraph 1:

Vanco admits the allegation contained in rhetorical paragraph 1 of defendant's First Affirmative Defense as to Counts I and II of Vanco's Amended Complaint.

Paragraph 2:

The Complaint in this cause was filed on December 28, 1976.

Answer to Paragraph 2:

Vanco admits the allegation contained in rhetorical paragraph 2 of defendant's First Affirmative Defense as to Counts I and II of Vanco's Amended Complaint.

Paragraph 3:

The applicable Statute of Limitations (15 U.S.C. § 4B) bars actions unless commenced within four (4) years after the cause of action accrued.

Answer to Paragraph 3:

Vanco denies that the applicable Statute of Limitations, 15 U.S.C. § 15(b), bars actions unless commenced within four (4) years after the cause of action accrued when, as in this case, the violation on which recovery is based was not discovered by plaintiff due to fraudulent concealment by the defendant. The Plaintiff in this case will prove that, as to Count I, as a result of defendant's fraudulent concealment of its violation of 15 U.S.C. § 1 and 15 U.S.C. § 2, plaintiff had no knowledge of the conspiracy charged until on or about June 22, 1978, when the principal officer of plaintiff attended the deposition of Mr. James F. Tate, the principal officer of the defendant. As to Count II, the plaintiff in this case will prove that, as a result of defendant's fraudulent concealment of its violation of 15 U.S.C. § 13(a) plaintiff did not discover the defendant's violation of said statute until approximately July of 1974. In both cases, as to Count I and Count II, the four year period of limitations does not commence to run until the date of discovery of defendant's violations by the plaintiff.

Paragraph 4:

Therefore, there can be no recovery for actions occurring prior to December 28, 1972.

Answer to Paragraph 4:

Vanco denies that there can be no recovery for actions occurring prior to December 28, 1972 as the statute of limitations did not commence to run at that time, but was tolled as a result of defendant's fraudulent concealment of its violations until the time at which plaintiff discovered defendant's violations. The Complaint in this action being filed well within four (4) years from the relevant dates of discovery, plaintiff may recover for actions occurring before December 28, 1972. This applies to Count I and Count II of plaintiff's Amended Complaint.

COUNT III

Paragraph 1:

Count III of Plaintiff's Complaint alleges activity constituting a sale of goods subject to the Uniform Commercial Code (KRS 355.2-1 *et seq.* or IC § 26-1-2-1 *et seq.*)

Answer to Paragraph 1:

Vanco admits that Count III of plaintiff's Amended Complaint alleges activity constituting a sale of goods.

Paragraph 2:

The Complaint in this cause was filed on December 28, 1976.

Answer to Paragraph 2:

Vanco admits that the Complaint in this cause was filed on or about December 28, 1976.

Paragraph 3:

The applicable Statute of Limitations (KRS 355.2-725(1) or IC § 26-1-2-725(1)) bars actions unless commenced within four (4) years after the cause of action accrued.

Answer to Paragraph 3:

Vanco denies that the applicable statute of limitations bars actions unless commenced within four (4) years after the cause of action accrued when, as in the present case, the violation was concealed from the plaintiff by the defendant.

Paragraph 4:

Therefore, there can be no recovery for actions accruing prior to December 28, 1972.

Answer to Paragraph 4:

Vanco denies that there can be no recovery for actions accruing prior to December 28, 1972 when, as in the present case, the statute of limitations was tolled as a result of defendant's concealment of its violation. In the present case, plaintiff will prove that as a result of defendant's concealment plaintiff did not discover defendant's violation alleged in Count III of its Amended Complaint until approximately October, 1976, but in no event earlier than September 1, 1976.

Paragraph 5:

Alternatively, Count III of Plaintiff's Complaint alleges a contract partially in writing.

Answer to Paragraph 5:

Vanco admits that Count III of plaintiff's Amended Complaint alleges a contract partially in writing.

Paragraph 6:

The applicable Statute of Limitations (KRS 413.120 (1) or IC § 34-1-2-1) bars actions unless commenced within five (5) or six (6) years, respectively, after the cause of action accrued.

Answer to Paragraph 6:

Vanco denies that the applicable statute of limitation bars actions unless commenced within five (5) or six (6)

years after the cause of action accrued, as stated in rhetorical paragraph 6 of defendant's First Affirmative Defense to Count III when, as in the present case, the plaintiff did not discover defendant's violation alleged in Count III of its Amended Complaint as a result of defendant's concealment of such violation.

Paragraph 7:

Therefore, there can be no recovery for actions accruing prior to December 28, 1971 or December 28, 1970, depending upon the choice of state law applied herein.

Answer to Paragraph 7:

Vanco denies that there can be no recovery for actions accruing prior to December 28, 1971, or December 28, 1970, as stated in rhetorical paragraph 7 of defendant's First Affirmative Defense to Count III when, as in the present case, the statute of limitations was tolled until the time at which plaintiff discovered defendant's violation, which violation had previously been concealed by defendant. In the present case, plaintiff will prove that, as a result of defendant's concealment of its violation alleged in Count III of plaintiff's Amended Complaint, plaintiff did not discover defendant's violation until approximately October, 1976, but in no event earlier than September 1, 1976.

Paragraph 8:

Alternatively, Count III of Plaintiff's Complaint alleges an action based upon mistake.

Answer to Paragraph 8:

Vanco admits that Count III of plaintiff's Amended Complaint alleges an action based on mistake.

Paragraph 9:

The applicable Statute of Limitations (KRS 413.120 (12)) bars actions unless commenced within five (5) years after the cause of action accrued.

Answer to Paragraph 9:

Vanco denies that the applicable statute of limitations bars actions unless commenced within five (5) years after the cause of action accrued as stated in rhetorical paragraph 9 of defendant's First Affirmative Defense to Count III when, as in the present case, the plaintiff did not discover defendant's violation alleged in Count III of its Amended Complaint as a result of defendant's concealment of such violation.

Paragraph 10:

Therefore, there can be no recovery for actions accruing prior to December 28, 1971.

Answer to Paragraph 10:

Vanco denies that there can be no recovery for actions accruing prior to December 28, 1971 as stated in rhetorical paragraph 10 of defendant's First Affirmative Defense to Count III when, as in the present case, the statute of limitations was tolled until the time at which plaintiff discovered defendant's violation, which violation had previously been concealed by defendant. In the present case, plaintiff will prove that, as a result of defendant's concealment of its violation alleged in Count III of plaintiff's Amended Complaint, plaintiff did not discover defendant's violation until approximately October, 1976, but in no event earlier than September 1, 1976.

SECOND AFFIRMATIVE DEFENSE

Count II

Paragraph 1:

Count II of Plaintiff's Complaint alleges a violation of Section 2 of the Clayton Act (15 U.S.C. § 13).

Answer to Paragraph 1:

Vanco admits the allegations contained in rhetorical paragraph 1 of defendant's Second Affirmative Defense as to Count II of Vanco's Amended Complaint.

Paragraph 2:

Defendant's allegedly discriminatory prices do not constitute a violation of the Clayton Act since defendant's lower prices to Kentucky wholesalers were made in good faith to meet an equally lower price of a competitor (15 U.S.C. § 13(b)).

Answer to Paragraph 2:

Vanco denies each and every allegation contained in rhetorical paragraph 2 of defendant's Second Affirmative Defense as to Count II of Vanco's Amended Complaint.

THIRD AFFIRMATIVE DEFENSE

Count II

Paragraph 1:

Count II of Plaintiff's Complaint alleges a violation of Section 2 of the Clayton Act (15 USC § 13).

Answer to Paragraph 1:

Vanco admits the allegations contained in rhetorical paragraph 1 of defendant's Third Affirmative Defense to Count II of Vanco's Amended Complaint.

Paragraph 2:

Defendant's actions were in conformity with the provisions of IC § 7.1-1-1-1 *et seq.* and Chapters 241-244, inclusive, Kentucky Revised Statutes, which statutes are given primacy by reason of the provisions of the Twenty-First (21st) Amendment to the Constitution of the United States.

Answer to Paragraph 2:

Vanco lacks knowledge sufficient to form a belief as to the truth of the allegations contained in rhetorical paragraph 2 of defendant's Third Affirmative Defense to Count II, and denies that conformity with such statutes as are cited therein constitutes a defense to a violation of 15 U.S.C. § 13.

INDEX TO WITNESSES

Names, home addresses, business or professional affiliations

Blake, Charles A., 1801 Mt. Auburn Road, Evansville, Indiana, General Manager for WIKY AM and FM radio stations, serving, in Indiana: Evansville County, Vanderburgh County, Boonville in Warrick County, Mt. Vernon in Posey County, Princeton in Gibson County; in Kentucky: Henderson in Henderson County, Uniontown in Union County, Morganfield in Union County, Owensboro in Daviess County; and in Illinois: White and Edwards Counties. Educational background in communications, advertising, marketing and management.

Duvall, James Robert, 3311 West Michigan Street, Evansville, Indiana, self-employed private investigator, retired Senior Resident Agent at Evansville for the Federal Bureau of Investigation.

Fehn, Walter, 115 South Lincoln Park Drive, Evansville, Indiana, Advertising Director for the following Evansville, Indiana newspapers: The Sunday Courier and Press, The Evansville Morning Courier and The Evansville Evening Press.

Finney, David D., 2114 Redfern Drive, Indianapolis, Indiana. Vice President and Regional Counsel of the United States Brewers Association.

LaRue, Henry, 705 Crestmont Drive, Evansville, Indiana, Executive Vice-President of Vanco Beverage, Inc. since May 1, 1972, previously District Manager of Falls City Brewing Company from May 1, 1963 until May 1, 1972.

Peter, Emil, Jr., 18 Pembroke Road, Louisville, Kentucky, General Sales Manager and Vice President of Sales of Falls City Brewing Company; General Sales

Manager of Falls City Brewing Company for twenty-one and a half years.

Powell, Richard L., 613 First Street, Henderson, Kentucky, a manager of the House of Beverages, the largest retail beer and liquor store in Henderson, Kentucky.

Schmadel, Earl E., 111 North Redbank Road, Evansville, Indiana, President and major stockholder of Vanco Beverage, Inc., employed by Vanco Beverage, Inc. since 1953, member of the Indiana bar.

Schnatter, John H., 807 East Larkspur Drive, Jeffersonville, Indiana, sales representative for Falls City Brewing Company.

Seits, L.D., 2051 East Gum Street, Evansville, Indiana, reporter for Evansville Press.

Stephens, Hermann, 7200 East Walnut Street, Evansville, Indiana, certified public accountant, President of Stephens and Company, an accounting firm which provides services to Vanco Beverage, Inc.

Tate, James F., 516 Rolling Lane, Louisville, Kentucky, President of Falls City Industries, Inc. and its predecessor Falls City Brewing Company, since January, 1973.

Tornatta, Elmer, 2001 North New Green River Road, Evansville, Indiana, employed by beer distributorship in Chandler, Indiana; until 1978 owner of two retail liquor stores in Evansville, Indiana.

Utley, Ronald Edward, 2460 Bannockburn Drive, Henderson, Kentucky, President of Dawson Springs Beverage Company, distributor of Falls City Beer and Anheuser-Busch products in Henderson and Union Counties, Kentucky.

INDEX TO TRIAL COUNSEL

Counsel for Vanco Beverage, Inc.
John T. Cusack
Edward B. Hirshfeld
Michael E. Barry
James G. Bradford

Counsel for Falls City Industries, Inc.
Howard Adler, Jr.
Mary-Margaret Gillen
Kenneth Handmaker

EXCERPTS FROM TRANSCRIPTS OF TRIAL PROCEEDINGS

CROSS EXAMINATION OF L. D. SEITS

* * * *

[128] In one story volume transportation was reported, yes. This was at a point at which Evansville retailers were, rather than buying from their wholesalers, were buying from retailers in Kentucky because they said the retail price in Kentucky was lower than the wholesale price in Indiana.

* * * *

DIRECT EXAMINATION OF CHARLES A. BLAKE

[191] Q (By Mr. Hirshfeld) Where are the major shopping centers in Evansville, city of Evansville located?

A Dominant locations on the east side are Lawndale and Washington Square, and on the north side, North Park, North Brook.

There are Routes 41 and 41-A. 41 almost bisects the map, a little off the center of that city map as it goes, and then 41-A is a tangent off to the left as you look at it, and runs along the southwest boundary of Evansville.

Q 41-A runs around the boundary of Evansville?

A That's correct.

Q How does the location of Route 41 and Route 41-A in relation to the major shopping centers in the city of Evansville influence the shopping habits of Evansville residents?

A Well, the significant factor is that we don't have a major east-west thoroughfare in the city, and it makes it almost [192] as easy for people to get to the Old Orchard Shopping Center in Henderson, coming from the west side, as if they were going to go from the west side all the way to the east side at Lawndale and Washington Square.

THE COURT: How does industry compare, heavy industry compare in Henderson County with Vanderburgh County and Warrick County?

Q (By Mr. Hirshfeld) Do you know how heavy industry compares in Vanderburgh County as opposed to Henderson County?

A More of it in the Evansville area, of course, but there are plants like Anaconda, Big Rivers Power Plant, Firestone, and Goodyear in the Henderson area. There is traffic in that area from—

THE COURT: Where is Alcoa in relation to that area?

THE WITNESS: Alcoa is in Warrick County, to the east of the major shopping complex.

THE COURT: What is its employment?

THE WITNESS: I'd say around twenty-five hundred.

* * * *

[193] THE COURT: I don't think he answered my question before. How does industry, heavy industry in the Vanderburgh area opposed—Vanderburgh and Warrick County, there, compare with the Henderson County? The witness just started enumerating what industries was there in Henderson County.

Q (By Mr. Hirshfeld) How does the heavy industry in the Evansville area compare with—the heavy industry in Vanderburgh County compare with heavy industry in Henderson County?

A To be sure I understand what you are driving at there, how do you mean, "compare"?

THE COURT: What industry in Indiana—the labor force needs for it, and what does it siphon from Henderson County here, labor for industry on the other side? What industry in Henderson calls on the commuters from the other side of the river's population?

THE WITNESS: Well, I will try to [194] enumerate a little bit for that.

Anaconda is a significant employer, must have seven or eight hundred employees.

Big Rivers is a power plant which is adjacent to Henderson County.

There are Firestone and Goodyear plants also, which employ hundreds. I don't know specifically, but the significant flow of course is from the south to the north, into plants in Indiana, Whirlpool and Bucyrus-Erie, Arkla plants.

THE COURT: We are on the record, and we know but we have to have it on the record here what is on the north side now. You mentioned two or three there.

THE WITNESS: I mentioned two or three. We have Bucyrus, General Mills, General Tire—

MR. HIRSHFELD: This is one of the exhibits, Exhibit 34, the brochure. Perhaps he can rely upon it to refresh his recollection about industry in the area.

THE COURT: All right.

(Mr. Hirshfeld handed a document to the witness.)

THE COURT: This map, 35-A, emphasizes the banks, and the number of employees in the banks aren't [195] that numerous.

THE WITNESS: It mentions one specifically, Zenith, employing twelve hundred.

THE COURT: Mead Johnson, what is it?

THE WITNESS: Zenith Electronics.

THE COURT: All right.

THE WITNESS: Twelve hundred employees. Mead Johnson & Company, three thousand.

Alcoa Warrick Works is thirty-three hundred at this time.

And Whirlpool Corporation varies from five to seven thousand.

Those are the big ones, but in addition there's a considerable amount of retail activity and loss of these—not blue collar workers at that point, but lots of service-type personnel keep the shopping centers active, employed there.

Q (By Mr. Hirshfeld) Will people tend to shop in the same areas that they work?

A I would say this would be a natural flow of events.

Q Are people willing to travel anywhere from five to thirty miles to shop at an attractive shopping center?

A I think that has been illustrated very well by the flow of traffic to the new shopping center, the Owensboro [196] Town Square Mall.

* * * *

DIRECT EXAMINATION OF ELMER TORNATTA

[218] Q (By Mr. Hirshfeld) Did you have any other competitors?

A Well, yes, I—Henderson was quite a factor in it at that time. They have been quite a bit cheaper, and a lot of people were going across the river to buy their beer.

Q How did your prices of beers compare with prices of your competitors, Evansville competitors?

MR. ADLER: I object to foundation.

Q (By Mr. Hirshfeld) If you know.

THE COURT: Overruled.

Q (By Mr. Hirshfeld) Did you ever check the prices of beer charged by your Evansville competitors?

A Yes, sir, I checked with them several times. I was in the habit of keeping up on what competitors was doing in their stores, checking the prices.

Q Did you ever check prices of your Henderson competitors?

A Well, I went through there, yes, knew what they were, [219] because I had been fishing over there around Kentucky Lake. I have been to several basketball games in that area, and I would stop and pick up, you know, packages, know the difference from mine.

Q How often did you go through Kentucky?

A Well, just periodically, whenever there was a ball game, maybe every three months. It just varied.

Q Where did you go in Kentucky?

A Into Owensboro, Bowling Green, and down around Paducah, those areas. Just according to what the situation was, where I was going, you know.

Q How did your prices of your beer compare with prices charged by your Evansville competitors?

* * * *

A We were pretty close to competitive. We tried to stay close to what our competition was so they were comparable, a nickel, dime one way or the other.

Q (By Mr. Hirshfeld) Was that true during the entire period you owned the liquor stores?

A Well, no. When Henderson—at one time, they called it the beer thing where they were quite a bit cheaper than our [220] price was.

Q You were approximately the same, a nickel or a dime difference, with your Evansville competitors during the entire time that you—

A They stayed pretty close in the Evansville market. Some of them were different but the majority were pretty closely competitive.

Q Where did your customers come from?

A Well, the K Mart, they were from all over; I mean Illinois, Kentucky. They come in from—you know, since there was a shopping center, there was a lot of transient trade, and I would get a lot of traffic from all directions, you might say.

Q Were there any customers from dry counties in Kentucky?

A Well, yes, I'd say they were. I had a lot of customers come—

MR. ADLER: Object, your Honor; no foundation.

THE COURT: Would you have him explain how he knew where they were from?

Q (By Mr. Hirshfeld) How do you know where your customers came from?

A There was conversation. They would come up and, you know, a lot of them would be looking for better prices and [221] things, and you get in conversation with them and they were—tell you they were over from Kentucky or Illinois. I had, you know, different basis. I don't know, just a lot of people that come in to—

Q How did you determine they were persons from dry counties in Kentucky?

A Actually the majority of times, their telling you they were from that area, pretty well.

* * * *

[222] Q How did your customers react to the prices in Kentucky?

A. Well, you could pretty well tell. They would be mad. A lot of them would come in with complaints about our prices being so much different than about seven or eight miles from my store to the Henderson stores, and of course they tell you that they would go over there and pick it up, buy beer over there, and probably a lot of other—cigarettes were a lot cheaper, pick them up and bring it back. They complained about our prices in Evansville being so much higher than what they would be in Henderson, and that.

* * * *

[228] A Yes, sir, I have known some people go over there just to pick their cigarettes up. In fact—the clerk that, lady that worked for me at the store, she would go get her cigarettes there because they were almost as cheap, little cheaper than we could buy them here in Indiana.

Q Did Henderson beer retailers ever advertise prices in the Evansville newspaper?

A Yes, sir, I have seen it in Evansville papers.

* * * *

Q (By Mr. Hirshfeld) Do you recall seeing these [229] advertisements in the Evansville newspapers at the time they were run?

A Well, I'd say they were run; names are familiar. You know, seeing them and being familiar with them, the names, I'd say yes, that I had seen these. This is probably ones that I had seen.

Q How did your customers react to these advertisements?

A Well, like I said, they would come in and a lot of them be angry, you know; they had paid so much for

the price of my beer, and they could go over to Henderson and get it, and they were mad, want me to lower my prices. I tried to tell them my prices were—I had to pay more for it than these prices would have been at that time, so I tried to explain to them that I couldn't lower my prices that low and the reason for it, but still they come in and complained. Of course everybody was looking for a bargain.

• • • •

[276] MR. CUSACK: At my directions the United States Marshal served a subpoena on Mr. David Finney, your Honor. At 12:50 today I telephoned Mr. Thomas Austern, of the firm of Covington & Burling, outside counsel, the litigation counsel of the United States Brewers Association. He advised that Mr. Finney will be coming to Washington, D.C. tomorrow, to his offices, and that he does have some documents in response to our subpoena to the United States Brewers Association, he does have some papers, and that he is going to review those papers with Mr. Finney, and that it would be agreeable for him to schedule Mr. Finney to testify on Friday afternoon.

Mr. Austern stated that he could not attend at the time, nor could anyone from his firm, and he did not feel it was necessary for an attorney to be present to represent the United States Brewers Association with Mr. Finney, and that he is going to call Mr. Adler this evening or tomorrow morning at Stouffer's Inn and discuss this with him.

THE COURT: Mr. Smith, you call Washington, D.C. and notify that law firm for the United States Brewers Association that the matter is being set for [277] hearing, evidentiary hearing and argument if necessary, upon the motion of May 10, 1979 of the plaintiff here to reconsider the agreement and order with respect to the subpoena to the United States Brewers Association of July 17, 1978.

Have you renewed that subpoena?

MR. CUSACK: Yes, your Honor. We have a trial subpoena for Mr. Finney.

THE COURT: To the same effect as this one of July 17, '78?

MR. CUSACK: Yes, your Honor.

THE COURT: And just add in addition thereto, the subpoena of what date?

MR. BRADFORD: May 3.

MR. CUSACK: May 3, your Honor.

Your Honor, the import—

THE COURT: I just want to get the record finished here now.

And the objections of the United States Brewers Association to that subpoena for one Finney and the objections to the subpoena duces tecum accompanying it, do they need further notice, that law firm?

MR. CUSACK: No, your Honor. The impression I got from Mr. Austern is that they are withdrawing their objection at this time, in his telephone [278] conversation.

THE COURT: We don't do business by phone. We just alert people—

MR. CUSACK: I understand, your Honor.

THE COURT: When we take dead aim at somebody we don't intend to cripple him, see?

MR. CUSACK: Yes.

THE COURT: We want to finish the job.

MR. CUSACK: Area code 202, 452-6000; Thomas Austern, A-U-S-T-E-R-N.

THE COURT: And you follow it up with a written notice. Get it there as quick as you can, because it's set for Friday at 1:00 o'clock on May 18, 1979.

In your telephone conversation you report what you heard here, that that was your understanding that they probably would withdraw their objections on Friday, and whoever they send should be prepared to say so on the record. Warn him on the telephone that the written notice of the hearing will follow, but they can't rely upon the mail service.

And you are so noticed for 1:00 o'clock Friday afternoon.

DIRECT EXAMINATION OF JAMES ROBERT DUVALL

• • • •

[302] MR. BARRY: Thank you.

Your Honor, we have attached to the tripod Plaintiff's Exhibit 35-A, which was admitted into evidence yesterday. I would like to ask Mr. Duvall now to mark on Plaintiff's Exhibit 35-A, which is a map of Evansville, the location of the stores which he interviewed which comprised part of the report.

THE COURT: Would you give, for the record here, the direction to the witness now, the code that you asked him to use in so marking it, if there is a code?

MR. BARRY: The code we thought—

THE COURT: Tell him. Go ahead.

Q (By Mr. Barry) Mr. Duvall, in marking the location on the map, Plaintiff's Exhibit 35-A, of the stores that you interviewed, would you please use the numbers? Just mark them as number 1, 2, and et cetera, as they appear in your report, store number 1 being as in the first page of Plaintiff's Exhibit 84, Art's Package Store.

A Yes, sir.

• • • •

[306] Q (By Mr. Barry) Did store number 1 feel in competition with Kentucky retailers?

A Survey questions, answer 1, he was aware of prices for beer in Henderson, Kentucky.

Answer number 2, generally prices—he said prices were lower in Henderson than in Evansville.

Answer number 3 was that his customers would buy beer in Henderson when prices were lower than in Evansville, he [307] advised, sometimes.

Answer number 4, did he lose customers to the Kentucky liquor stores, he says no.

And number 5, did you feel you were competing with those liquor stores in Henderson, the answer was no.

Q Could you point out in the map what area of town that Art's Liquor Store was located?

A Art's Liquor Store is located on the west side of Evansville, at Franklin and—roughly Franklin and St. Joseph avenues. It's a small-business-type area of the city.

Q Directing your attention to store number 2, Bellemeade Liquors.

A Bellemeade Liquors, Mrs. Adella H. Stagg.

Q What is the background of that retailer?

A She has been in business approximately ten years.

Her beer sales have been consistent over the years.

Her main source of competition in the neighborhood is cut rate stores.

And concerning whether beer buyers will travel to save money, some will travel to save any time.

Answers to the survey questions, question number 1: Customers aware of the price of beer in Henderson, some.

Were the prices higher or lower or the same as in [308] Evansville, she said the prices in Henderson were lower.

Number 3, would your customers buy beer in Henderson where the price there was lower than in Evansville, they did to an extent for a period of time.

Number 4, did you lose customers to Kentucky liquor stores at that time, she said yes.

Do you feel that you were in competition with those liquor stores in Henderson, no, not to any great extent.

• • • •

Q (By Mr. Barry) Mr. Duvall, directing your attention to Store number 4, how did Crown Liquor respond to the survey questions and background questions?

A The background questions, they have been in business approximately eighteen to nineteen years.

[309] Beer sales have been quite consistent.

His main competition is from grocery and drug stores.

There was no answer to number 5 as to the buyers' travel to save money.

Survey questions: Were your customers aware of the price for beer? Yes, very much.

Number 2, generally, were the prices in Henderson lower, about the same, or higher than in Evansville? Yes, lots.

Number 4: Did you lose customers to the Kentucky liquor stores at that time? The answer was no.

Did you feel you were competing with those liquor stores in Henderson? The answer was no.

Q Store number 5, Likker Mart and Your Liquor Store?

A He had been in business approximately 25 years. His sales had been consistent during the period.

And the reason that—

Were there any particular good or bad periods? Yes.

Do you know the reasons for them? Answer: During Henderson beer crisis.

Where does your toughest competition come from? Cut Rate Liquor Store and drug stores in which I might explain, Cut Rate Liquor Store is the name of a liquor [310] store in Evansville that has recently come in, not general.

Q Thank you.

A Will beer buyers travel to save money? Yes on all three: A six pack, a case, or a few cases.

Survey questions:

Number 1, were your customers aware of the prices for beer in Henderson, Kentucky? Yes.

Number 2, generally, were the prices in Henderson lower, about the same, or higher than in Evansville? Lower.

3, would your customers buy beer in Henderson when the price there was lower than in Evansville? Yes.

Did you feel you were competing with those liquor stores in Henderson? Yes.

Q Mr. Duvall, I believe I forgot, neglected to ask you whether Bellemeade Liquor Store, number 2, where Bellemeade Liquors is located on the map. Which section of the city?

A Bellemeade liquor store is located on Bellemeade Avenue approximately two blocks from the University of Evansville, and then it's a neighborhood-type area.

Q And Crown Liquor Store, number 4?

A Crown Liquor is located at Mount Vernon and Tekoppel, on [311] the extreme west side of Evansville.

Q Likker Mart and Your Liquor Store?

A Likker Mart is on Boonville Highway, at the K Mart Shopping Center, intersection of Boonville Highway and Boeke.

Q Where is Your Liquor Store located?

A Fulton Avenue, intersection with Columbia Street, north side of it.

Q Directing your attention to the next store, Reising's.

A Reising's, background questions: Been in business for 30 years.

Have your beer sales been consistent? Yes.

Were there any particular good or bad periods? Yes, due to economy and store location.

Do you know the reasons? Yes.

What is your toughest competition? Grocery and drug stores.

Will beer buyers travel to save money on a six pack? No.

Travel to save money on a case? Yes.

Travel to save on a few cases? Yes.

Q Now the survey questions?

A The survey questions: Were your customers aware of the prices for beer in Henderson, Kentucky? The answer was [312] yes.

Number 2: Generally, were the prices in Henderson lower, about the same, or higher than in Evansville? Lower.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? The answer was yes.

Number 4: Did you lose customers to the Kentucky liquor stores at that time? The answer was yes.

Number 5: Did you feel you were competing with those liquor stores in Henderson? The answer was yes.

Q Where is Reising's located?

A Reising's is in the downtown area of Evansville, at the intersection of 3rd and—well, it's northwest 3rd Street, two blocks from the old Federal Building.

Q Store number 9, Continental Party Mart.

A Continental Party Mart background questions: The first was, how long have you been in business? The answer was 13 years.

If you note, there's no additional background questions answers, as there was quite a conversation held, and the survey questions were interspersed in the conversation, so the survey questions are answered.

Number 1: Were your customers aware of the prices [313] for beer in Henderson, Kentucky? The answer was yes.

Number 2: Generally, were the prices in Henderson lower, about the same, or higher than in Evansville? The answer was lower.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? The answer was yes.

Number 4: Did you lose customers to the Kentucky liquor stores at that time? The answer was yes.

Number 5: Did you feel you were competing with those liquor stores in Henderson? The answer was yes.

This store is located at Lincoln Avenue, which is—Old 41 and Lincoln Avenue, now Kentucky, Continental Party Mart.

MR. BARRY: The paragraph at the bottom of the section is deleted from the exhibit.

THE COURT: He is referring to page 7, Mr. Oesterriech, commencing with the name "Mercer" and the following five lines to the end of the page is deleted.

MR. BARRY: Thank you, your Honor.

Q (By Mr. Barry) Directing your attention to store number 11, Dufies, Mr. Duvall.

A That is located on Heidelbach, neighborhood located right in here.

[314] THE COURT: Mr. Oesterreich, that name is D-U-F-I-E-S.

THE WITNESS: Yes.

THE COURT: Not Duffies, as you would think.

Q (By Mr. Barry) Where is Dufies located, Mr. Duvall?

A Located on Heidelbach in the neighborhood area approximately two blocks from Bosse Field.

Q How did they respond to the questions?

A Number 1: How long have you been in business? Approximately 20 years. 20 years is the answer, not "approximately".

Have your beer sales over the years been quite consistent? Yes.

And were there any particularly good or bad periods? No.

3: Where does your toughest competition come from? Doesn't know.

What retail beer sellers do the most advertising? None.

And 5, he sells six packs mostly, so the survey questions and 1 through 5 was "Don't know".

Q Store number 12, Economy Liquors, was located where?

A Economy Liquors has two locations. One location is in [315] North Park Shopping Center, which is on 1st Avenue, and the second location is on Covert Avenue, approximately two blocks from the intersection with Boeke Road, on the east side of Evansville.

Q How did—

A Background questions is that the first of the stores started in 1963, and the Covert store January 1971. He has operated both stores since January '71.

Have your beer sales over the years been quite consistent? Fluctuates.

Were there any particularly good or bad periods? Yes.

Do you know the reason for them? According to price.

Where does your toughest competition come from? Henderson, Kentucky.

What retail beer sellers do the most advertising? Retail liquor stores could not advertise until 1975 or 1976 and Henderson stores could.

Where do they advertise? Mostly newspapers.

• • • •

[316] A (Continuing) Whose ads appear to be most effective? Henderson.

Will beer buyers travel to save money? All of them.

To the survey question, to number 1: Were your customers aware of the prices for beer in Henderson, Kentucky? Yes.

Number 2: Generally, were the prices lower, about the same, or higher than in Evansville? The answer was lower.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? Yes.

Number 4: Did you lose customers to Kentucky liquor [317] stores at that time? The answer was yes.

Number 5: Did you feel you were competing with those liquor stores in Henderson? Answer yes, definitely.

MR. BARRY: We are deleting—

THE COURT: The rest of it will be deleted of record, page 9.

Q (By Mr. Barry) Store number 13, Frontier Liquors. Do you know where 13 is now?

A It's known as Frontier Liquors. In '72 and '73 it was called the Liquor Mart, and another name. They were the same owner; just changed the name. The owner, she actually had three licenses but she's operating two stores at the present time as the survey was taken.

Q Where are they located?

A Located at the intersection of Boonville Highway and Oak Hill Road, on the north side of Evansville, and the other store is located across from Washington Square shopping center.

The answers to background questions, how long she had been in business, since 1946.

Have your beer sales over the years been quite consistent? Fairly steady, and with seasonable fluctuations.

Where does your competition come from? Grocery and out of state.

[318] State that stores in Indiana couldn't advertise until about one and a half years ago.

And will beer buyers travel to save money on sick [sic] packs, a case, a few cases? The answer was that people who travel will bring into state and several persons going together would travel for beer.

Survey question: Were your customers aware of the prices for beer in Henderson, Kentucky? The answer was yes, due to Kentucky newspaper ads in Evansville papers.

Number 2: Generally, were the prices in Henderson lower, about the same, or higher than in Evansville? Lots lower.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? Yes.

Number 4: Did you lose customers to the Kentucky liquor stores at that time? Probably, and so did other stores.

MR. ADLER: Move to strike "and so did other stores", your Honor.

THE COURT: It is stricken.

A (Continuing) Number 5: Did you feel you were competing with those liquor stores in Henderson? Yes.

THE COURT: The next three paragraphs, beginning with Mrs. Fehn, and ending with the word [319] "locally" on page 10 are not a part of this exhibit in accordance with the offer, as limited by counsel.

MR. BARRY: Thank you, your Honor.

Q (By Mr. Barry) Store number 14, Shamrock Liquors, where is that located?

A Shamrock Liquors is located at Covert and the intersection of Green River Road, approximately a block and a half from the Washington Square shopping center.

Background questions were, number 1: How long have you been in business? Since 1968.

Have your beer sales over the years been quite consistent? He said he didn't know.

Where does your toughest competition come from? Drug stores.

And to questions 4 and 5, he didn't know.

Survey questions, he answered question number 1: Were your customers aware of the prices for beer in Henderson, Kentucky? Yes.

Survey question number 2: Generally, were the prices in Henderson lower, about the same, or higher than in Evansville? Lower, according to his customers.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? Yes—by carload.

* * * *

[321] Q (By Mr. Barry) Mr. Duvall, I believe you were at question number 4 of the survey.

A Question number 4 of the survey: Did you lose customers to the Kentucky liquor stores at that time? Yes.

Did you feel you were competing with those liquor stores in Henderson? Yes.

* * * *

Q (By Mr. Barry) Store number 15, Signal Liquors, where is that located?

A That is on Heidelbach, approximately a block and a half north of Division Street.

Signal Liquors had been in the business, in the background, 32 years.

Have your beer sales over the years been quite consistent? Yes, gaining.

[322] Were there any particular good or bad periods? Do you know the reason for them? Recession—recession caused loss of sales.

His biggest competitor is groceries, drug stores.

Will beer buyers travel to save money on six packs, a few cases? Yes, few cases.

The survey questions, number 1: Were your customers aware of the prices for beer in Henderson, Kentucky? Yes.

Number 2: Generally, were the prices lower, about the same, or higher than in Evansville? The answer was lower, and at one time quite a bit lower.

Number 3: Would your customers buy beer in Henderson when the price there was lower than in Evansville? If there would buy.

Number 4: Did you lose customers to the Kentucky liquor stores at that time? No—maybe temporarily for a weekend but not constantly.

Number 5: Did you feel you were competing with those liquor stores in Henderson? In competition with everyone. Is a common marketplace in general but did not feel that he competed on a direct individual basis.

* * * *

[323] Q Where is store number 17, Lug-a-Jug, located?

A Number 17 is now located at the Boonville highway and Old 41, old Boonville highway. Mr. Swanagan, who has the license, formerly ran South 41 liquor store in '73 and '74, and he was moved from 41 south to this location due to the loss of his business. He has been in business for about ten years.

Beer sales over the years have been quite consistent.

His toughest competition is from the Cut Rate Liquor Store.

Listing in the Yellow Pages.

And will buyers travel to save money on six packs, occasional case, or a few cases, the answer was "All three".

Survey questions advised that: Were your customers aware of prices for beer in Henderson? No.

Number 2: Generally, were prices in Henderson lower than, about the same, or higher than in Evansville? They were lower.

[324] Number 3: Would your customers buy beer in Henderson when the price there was lower than Evansville? Don't believe would drive to Kentucky to buy beer.

Number 4: Did you lose customers to Kentucky liquor stores at that time? The answer was no, very few if any.

Did you feel you were competing with those liquor stores in Henderson? The answer was no.

* * * *

[325] (By Mr. Barry) Mr. Duvall, based on your survey, what conclusions have you reached on whether or not Evansville beer retailers are in competition with beer retailers in Henderson?

MR. ADLER: I object, your Honor. This witness has been offered to present a survey that he made. I think conclusions are for the Court to make from all the evidence. I don't think he can be qualified as an expert on competition, market definitions of the beer industry. He has been qualified as an FBI—former FBI man who makes surveys, reporting the results of his surveys. I think it's for the Court to make the—

THE COURT: Did you list the witness as an expert for the purpose of this opinion?

MR. BARRY: There were no lists of expert witness. We did not view it that he would be an expert—

THE COURT: The magistrate didn't require [326] you to list your experts?

MR. BARRY: I don't believe so, your Honor.

MR. CUSACK: No.

MR. BARRY: At any rate he was not—it was not notified to defense counsel that he would be offered as an expert.

THE COURT: I don't know, maybe I should recess and make arrangements to find out if he is an expert for this purpose.

The objection is sustained.

Q (By Mr. Barry) Mr. Duvall, please review the report, Plaintiff's Exhibit 84, and tell us how many of the 16 liquor licensees responding to your interview felt that they competed with retailers in Henderson.

A Ten of the 16.

THE COURT: I'm sorry. How many?

THE WITNESS: 10 of the 16 liquor license holders felt that they were in direct competition with Henderson, Kentucky stores.

MR. BARRY: No other questions at this time, your Honor.

* * * *

CROSS EXAMINATION

[334] Q Number 4, "What retail beer sellers do the most advertising", he answers, for a, "Retail liquor stores could not advertise until 1975 or 1976 and Henderson stores could."

4 b, "What methods of advertising are used most commonly in his area?" His answer was "Newspapers."

Answer 4 d: "Whose ads appear to be most effective?" And he answered "Henderson."

Now did you ascertain from this respondent, Mr. Schnee, whether he knew the percentage of Henderson, Kentucky retailers that ran advertisements in the Evansville [335] newspapers?

A Yes.

Q And what did he say?

A He said they definitely did and he could not, and he was very hostile at it over the period, because he was not permitted to advertise and Henderson was.

Q It was his understanding that the Henderson retailers advertised in the Evansville newspapers?

A He attempted to advertise himself and was fined by the Indiana Alcoholic Beverage Commission for advertising.

Q On the other hand, it was his belief—

A He was trying to fight his competition by advertising.

Q It was his belief Henderson retailers did advertise in the Evansville newspapers, right?

A Yes.

Q And did you ascertain from him whether he believed that the Kentucky retailers advertised all through this period we are talking about, 1972 through 1978, or only at one particular period of time?

A He was specifically talking about a specific period, and that period would have been several years before Indiana permitted the Indiana package stores to advertise.

Q He was talking about a specific incident?

A A specific period prior to about 1976.

[336] Q This was some time in '73-'74 that you referred to earlier, where there was this hue and cry?

A Yes.

Q Do you have any independent knowledge as to whether in fact the Kentucky retailers ever advertised in the Evansville paper at any time before that particular incident we're referring to, or at any time after that?

A Yes. In the newspaper it was very common to see large ads, especially on Friday, advertising a barge which is a restaurant which is located on the river, Ohio river, that's in Kentucky. There is a very large advertisement noting that liquor could be bought on the barge.

Q Robbie's Barge?

A Robbie's Barge, yes. And it's on the river, and therefore in the state of Kentucky although it's right by the Water Works, and they did land office business before Indiana permitted sales on Sunday.

Q That's primarily a restaurant?
A Primarily a restaurant; yes, sir.

• • • •

REDIRECT EXAMINATION

[343] Q Mr. Duvall, could you please mark on the map the location of the Barge, Robbie's Barge?
A It's at Inland Marina.
Q Would you point out there where it was?
A Just below the Evansville Water Works.
Q How far is that from downtown Evansville?
[344] A Approximately from Riverside and Main, I'd say it's a dozen blocks, if you go by blocks in that area; quarter mile to a half a mile. I'd say a half a mile would be easy.

• • • •

DIRECT EXAMINATION OF HERMANN STEPHENS

• • • •

[399] Q (By Mr. Hirshfeld) Mr. Stephens, based on your knowledge as Vanco's regular accountant and based on your knowledge of their cost accounting, in your opinion how well does Vanco control its costs?

A I think Vanco does a very good job of controlling their costs. They receive a monthly financial statement, and [400] they refer to that monthly financial statement, which not only gives them year-to-date figures and percentages but also monthly figures and percentages. They actually use that financial statement, I know from experience with them, in determining how to control their costs, which costs are out of line and which costs should be looked into, the overall percentage of expense—that is, selling expense, warehouse expense, general and administrative expense.

There is one other area. The overall expense has remained at about 25% over the last five or six years with the exception of '76, when the sales dip occurred and the percentage went up, and the dollar volumes did not get out of line.

They also have a perpetual inventory system on all their beer, which on a monthly basis they reconcile to the books via a physical inventory. Their perpetual inventory system is very effective in showing any shortages or overages. Those have been minimal during the period of time that I have been with Vanco Beverage.

* * * *

[415] A This exhibit shows the break down of the number of cases between Falls City, Anheuser-Busch, products, all other products, per—or by year, along with the number of cases and the percentages thereof.

Q Can you tell us how the percentage of Falls City sales [416] to—excuse me—percentages of Vanco's purchases from Falls City compared with the percentages of its purchases of other brands during the period as shown by that exhibit?

A Yes.

In 1972 Falls City's share of Vanco's sales by brand constituted 77.3%

THE COURT: What year was that?

THE WITNESS: 1972.

THE COURT: Thank you.

A (Continuing) In 1973 it dropped to 54.6%.

In 1974 it dropped to 47.3%

In '75 it dropped to 44.8%

In 1976 it rose to 47.2%.

And in 1977 it's 26.9%.

Q In your opinion is that a substantial amount of purchases—is it a substantial amount of Vanco's beer sales from Falls City?

A Very definitely so.

Q Would the impact of absorption of a price increase from Falls City on those amounts of beer sales of Falls City have a material impact on Vanco's income?

A Certainly would have.

* * * *

[433] Q Mr. Stephens, do you have an opinion as to how Vanco's expenses should be allocated among the various brands of beer itself?

A Well, the right way to allocate them would—a good way to allocate would be by the various brands, the expenses attributable to the various brands. Now that gets out of focus at times, and if you allocate them by case, which has been done in the past by us as well as other people, there are certain things that you must consider when you allocate them by case.

Now in the particular allocation that we were faced with before lunch, you must remember that back in '72 Vanco Beverage was geared up to do a certain level of business, and that business was a direct result of doing the vast volume with Falls City.

Now as the statistics show, Falls City has declined, and Vanco Beverage has had to scramble to replace that Falls City business with other businesses.

• • • •

DIRECT EXAMINATION OF
RONALD EDWARD UTLEY

• • • •

[483] Q What does the distribution of beer to the retailers involve?

A Well, we have the on and off-premises accounts. We have approximately, I'd say, 75% off right now, and 20% on premises.

Q What is off-premises?

A Off-premises accounts I consider as package stores, grocery stores.

On-premises accounts I consider that you would be able to drink in the premises.

• • • •

[504] Q (By Mr. Adler) Are you familiar with how Falls City sells its beer in Kentucky? That is, under what kind of a pricing system?

A It's one pricing system for all wholesalers in the state of Kentucky.

Q How do you know that?

A Because they send out price bulletins to all Falls City distributors in Kentucky.

Q Mr. Utley, have you ever put any pressure on or spoken to Falls City about the importance of their selling beer to you at a price lower than they sell beer to the wholesalers in Evansville?

A No, sir.

• • • •

CROSS EXAMINATION

• • • •

[516] Q And it's a fact then, Mr. Utley, you agree that people drive distances to buy beer at a cheap price, don't they?

A Yes, sir, I'd say they would,

Q And as a matter of fact people buy beer from the dry counties, and they come into Evansville, to the strip, or to Henderson?

A Yes.

Q As a matter of fact, sir, consumers of beer residing in dry counties of Kentucky in order to buy cheap beer will come from the dry counties, go through the city of Henderson on Highway 41, through the strip where the House of Beverage is located and depots, will cross the twin bridge over the Ohio River and go over to the Bridge Boat Club to buy beer cheaper, won't they?

A They could; yes, sir.

Q They'll do this if it is cheaper?

A Yes.

Q You said it was cheaper?

A It was cheaper then, yes, sir.

• • • •

[518] Q Direct your attention to page 3 of PX-43, and it has Market Analysis—Price Structure. Do you see that, sir?

A Yes, sir.

Q And at page 3 it states that, as I understand it, Falls City, Pabst, Falstaff, Sterling, Strohs, Blatz, Weidemann, Carling, and Oertels is selling for $3.50 a case for 24 12-ounce export returnable bottles. Non-returnable quarts are selling for four fifty a case.

A Yes, sir.

Q Four six packs non-returnable at three ninety-five; Twenty-four—case of twenty-four twelve ounce cans, four fifteen; and a case of twenty-four sixteen ounce cans for four eighty.

Isn't that correct, sir?

A That's right.

Q These are all the same, aren't they?

A Yes, sir.

• • • •

[520] Q You have to have the same price in the same competitive area in order to be competitive among yourselves?

A Yes, sir.

Q Right. So it's very important for a distributor, isn't it?

A Yes, sir.

Q I mean, you would have a real hard time selling Falls City beer on or about the time that this exhibit is dated, which is Falls City 43, which is February 13, 1974—you would have a hard time selling Falls City in competition with Falstaff, Sterling, Pabst, Strohs, Blatz, Weidemann, Carling, and Oertels if they are selling at three fifty and if you were selling at three seventy-five? You wouldn't sell much beer, would you?

A That would hurt you.

Q Sure would. Thank you.

• • • •

[530] Q (By Mr. Cusack) Mr. Utley, let me show you Plaintiff's Exhibit 110, which shows the difference in the prices that you were charged by Falls City to your company, Dawson Springs, and to Anheuser-Busch—the

prices Anheuser-Busch charged you. Do you see that, sir?

A Yes, sir.

Q Do you see it's for the dates July 24, 1973 through July 4, 1977?

A Yes, sir.

Q Isn't it a fact, sir, that that entire exhibit shows that for the dates appearing on that exhibit Falls City's prices to you were less than Anheuser-Busch's prices to you for Busch beer?

A Yes, sir, according to these.

Q At all times during that period wasn't that true?

A Uh-huh.

MR. CUSACK: Thank you, sir.

• • • •

[532] Q This shows, does it not, Mr. Utley, that when Falls City is pricing to you they weren't meeting the lower prices of Busch; they were beating them, weren't they?

A Yes, sir.

Q Thank you.

• • • •

Q (By Mr. Cusack) Does that refresh your recollection with regard to the Falls City prices, and isn't it a fact that Falls City prices generally were lower than Busch's?

A Yes, sir, they were lower.

Q Thank you.

Can you recall any time they weren't lower?

A When Falls City was not lower?

Q Than Busch.

A I would have to go back and look. I can't recall.

• • • •

[535] Q Now how do you do that, sir?

A I just try to keep my brand competitive with wholesalers in Paducah and Hopkinsville.

Q You would have to be competitive with them, Hopkinsville, 8[illegible] miles away?

A Yes. Paducah, a hundred miles.

Q That's west of there?

A West.

Q Sir, you knew that the Bridge Boat Club sold beer for off-premises consumption, didn't you?

A Yes.

Q To an awful lot of them, didn't they?

A Yes, sir.

Q Mr. Utley, is it a fair statement that sales of returnable bottles are mainly to restaurant and bars for on-premises consumption?

A Yes, sir.

Q Is it also fair to say, then, that if a company has a greater percentage in returnable bottles than other type packages it is doing business more as a restaurant than otherwise? Is that right?

A Yes.

Q Is it also fair to say that if a distributor is selling a greater percentage of cans than non-returnable bottles he [536] is selling more to the package stores? Isn't that right?

A Yes, sir.

Q In regard to package stores, sir, can you tell us how many depots there are on the strip from the twin bridge to the House of Beverage, which is the beer depot we're talking about?

A Talking about anybody handling beer on the strip?

Q Talking about beer depots between—

A All right.

Your Bridge View Inn. You have got Trixie's Alibi. You have got Audubon Package Liquor Store. Old South. You have got Howard Johnson's there. You have got Parker's. You have got House of Beverage. Cap & Cork?

A Cap & Cork, yes.

Q What about Last Chance?

A I have never heard of Last Chance.

* * * *

DIRECT EXAMINATION OF HENRY LaRUE

* * * *

[542] Q How long have you been with Vanco?

A Since May 1, 1973—1972.

Q Prior to that where were you employed?

A Falls City Brewing Company.

[543] Q In what position, sir?

A District manager.

Q And for how long were you with Falls City Brewing Company?

A Nine years. I was employed there May 1, 1963.

Q And what was your territory, sir?

A Southwestern Indiana, bordered on the north by Terre Haute and Bloomington, and on the south by—south and east by Jeffersonville and Evansville, Indiana, and Mt. Carmel, Illinois.

Q Mr. LaRue, did Falls City charge different prices to Kentucky distributors than to its Indiana distributors?

A It did.

Q Which price was higher?

A Evansville—I mean Indiana price.

Q Throughout the period when you were with Falls City?

A Throughout the period.

Q Could you tell the amount of the charge—I mean, I will rephrase that.

Could you tell the amount of the prices that Falls City charged to its Indiana distributors over Kentucky distributors on a case basis? How much more were they charged during this period?

A They charged between—approximately between fifty and [544] seventy-five cents.

Q A case?

A A case difference.

Q Who did you report to at Falls City Brewing Company, sir?

A Emil Peter.

Q What was his position?

A General sales manager.

Q Mr. LaRue, where there was a large Falls City market in Kentucky and a smaller Falls City market adjacent to it in Indiana, was there any attempt by Falls City to equalize the price in Indiana with the Kentucky price?

A Only on one occasion do I know such an instance.

Q Will you please tell us about that?

A When the price in Louisville was—this was approximately the period of the late '60's, '68 through approximately 1970, maybe '71; can't recall the exact year—when the Louisville price was extremely low, and at that time I believe the Louisville wholesale price was lowered, lower than the Indiana dock price, and Emil Peter on one occasion told me that they had found a way to give Jeffersonville relief.

Q By that, do you know how Jeffersonville got—

A Income relief, through some means.

• • • •

[545] Louisville?

A Be more competitive with Louisville, so that the price differential—Jefferson had to be competitive with Louisville because they were approximately the same consumers.

THE COURT: There may be a lot of Jeffersonvilles. Will you ask him what state that is?

Q (By Mr. Cusack) In what state is Jeffersonville?

A Indiana. Jeffersonville, Indiana.

Q Where is that located from the city of Louisville in Kentucky?

A It's ten minutes from downtown Louisville.

Q Across the bridge?

A Right.

THE COURT: We'll take judicial knowledge of that.

MR. CUSACK: Thank you, your Honor.

Q (By Mr. Cusack) Mr. LaRue, did you call on Vanco Beverage with regard to your duties for Falls City Brewing Company?

A I did.

Q What did you observe as to the way Vanco conducted its business?

A Vanco at that time was—the time that I called on them was [546] the top Falls City distributor. To my knowledge they were performing as well as I know that a distributor could perform in carrying out the function of marketing Falls City products.

* * * *

[547] Q Since May of 1972 through November of 1978, Mr. LaRue, have you observed competitive problems peculiar to Vanco?

A Repeat that.

(The reporter read the pending question.)

A Declining sales.

Q Can you give any reason for that?

A Price differential between the Henderson market and the Evansville market has been one reason.

Another reason would be the declining image of the Falls City brand as compared to what it was seven years ago or eight years ago.

Q In your opinion, sir, has Falls City Brewing Company—excuse me, strike that.

In your opinion, sir, has Vanco lost business as a result of lower prices in Henderson, Kentucky?

A Absolutely.

* * * *

[590] Q Mr. LaRue, I am handing you a document which has been marked as Trial Exhibit Falls City 50. Would you identify the document which I handed you?

A It's a report written by me to Emil Peter dated January 7, 1972.

* * * *

[609] REDIRECT EXAMINATION

QUESTIONS BY MR. CUSACK:

Q Mr. LaRue, during the time period from May 1972 through November 1978 you were aware that there was a difference in the retail price of Falls City beer sold in Henderson County, Kentucky as compared to the retail prices of beer sold in Vanderburgh County, Indiana?

A I was.

Q And can you tell us approximately what that price difference was during that period of time on a case of beer?

A On a six pack of beer—let's take a six pack rather than a case—on a six pack it averaged between thirty to forty cents.

Q So if the difference—

Was Henderson lower?

A Henderson was lower.

Q If you had thirty cents on the six pack, would it be a dollar twenty on a case of cans?

A Not necessarily be that much, because six packs by themselves are usually marked up higher than if you bought in bulk 24.

Q On the cases, what would be—a case of cans would be what?

[610] A Probably a dollar.

* * * *

DIRECT EXAMINATION OF EARL E. SCHMADEL

* * * *

[619] Q Would you give your employment history with Vanco?

A I bought out one of the stockholders of Vanco in September of 1953, at which time I became president.

Q In 1953 what brands did Vanco handle?

A In 1953 Vanco handled the complete Anheuser-Busch products, Miller beer, and Falls City beer, and

Heineken's imported beer, as well as some other brands of imported beer that I can remember.

Q What was your leading seller in 1953?

A Falls City.

Q Where did Falls City rank in Vanderburgh County, Indiana?

A At that time—that is, in September of 1953, I believe Sterling was the leading seller and Falls City was a close second.

Q Is Sterling brewery located in Evansville?

A Yes, sir, it is.

Q Was it located there in 1953?

A It was.

Q Did Vanco take on or lose any brands from 1953 to November [620] of 1978?

A Well, there was a time when Millers didn't sell very well, and we gave that up by mutual agreement. And some of the imported beers we simply discontinued.

Q Did you take on any additional Anheuser-Busch products?

A There was a short time that Anheuser-Busch made a beer they called Busch-Bavarian that didn't sell very well. We handled that for a few months. Then that was discontinued by them. I don't remember exactly when that was.

Then, when Anheuser-Busch introduced their Busch beer shortly before 1973 they brought it into our area and permitted us to take distribution of it in April of 1973.

Q Did you take on any of additional brands of the Falls City Brewing Company, sir?

A When Falls City introduced Drummond Brothers Preferred Beer we began to handle that. I don't remember that date.

Q Did Vanco purchase any other brands of beer or distribute any other brands of beer in the relevant period of time? In other words, from August 1972 through November 1978?

A Yes, sir, we did.

Q What brands are those, sir?

A In March or April of 1977 we acquired by the purchase of franchise from Heileman the Sterling brand and the local [621] distribution from the Heileman plant, and that purchase included the distribution for Drewry's and Cook's brands.

Q How much did this cost Vanco, sir?

A We paid Heileman $85,000 in cash for the franchise, and in addition to which we were required to purchase Sterling's delivery fleet and to buy their draft service equipment.

Q How much was the delivery fleet? How much did the delivery fleet cost?

A I think it was just under $50,000.

Q How much was the cost of the draft equipment?

A Couple of thousand.

Q So the total investment was—total purchase price for the Sterling franchise and distribution assets was $37,000? [Sic $137,000].

A Just about; yes, sir.

Q What was the reason for Vanco purchasing those brands?

A Our sales of Falls City had declined to the point where we had to do something to acquire some brand to keep our organization viable. We were reaching a point where we just simply couldn't keep operating, come anywhere near breaking even with the Falls City brands we had and Anheuser-Busch.

Q Mr. Schmadel, as a Falls City distributor do you have any knowledge where Vanco ranked in sales among Falls City distributors?

[622] A Yes, sir, I have information that was given to me by people who worked on the loading dock about 1956: We were hauling more Falls City beer than any other Falls City distributor. This was from the loading dock, not from any official word.

THE COURT: What loading dock, Counsel?

THE WITNESS: Falls City loading dock in Louisville, Kentucky.

Q (By Mr. Cusack) Mr. Schmadel, I show you what has been previously marked and I believe admitted into evidence as Plaintiff's Exhibit 72, which is a copy of the July 17, 1973 letter to you from Emil Peter, general sales manager of the brewery.

MR. ADLER: One of the letters of FC-1?

MR. CUSACK: Yes.

Q (By Mr. Cusack) And I direct your attention, sir, to the top paragraph on the second page of that letter, the second sentence, stating, quote: "After the first six months of business in 1972, the Evansville, Indiana market was only 56 cases behind the top Falls City distributor market."

Does this indicate to you that at or about July 17, 1973 Vanco had slipped from first place to second place among Falls City distributors?

[623] A That would be the implication that I would derive from reading this document, but it was the first indication that I ever had from any official at the brewery we were ever first.

Q They didn't admit it prior to that time?

A They did not officially ever admit it; no, sir.

Q Directing your attention, Mr. Schmadel, to Falls City Exhibit 1, which was shown to Mr. LaRue in his cross-examination by Mrs. Gillen, I direct your attention to those series of letters or correspondence back and forth from Mr. Tate and yourself and Mr. LaRue, and are you familiar with those letters, Mr. Schmadel?

A Yes, sir, I am.

Q Can you tell us, Mr. Schmadel, why in those letters there is no specific reference to—

MR. ADLER: I object to the form of the question, your Honor. There is no reference—

You haven't finished your question.

THE COURT: Proceed.

MR. CUSACK: Rephrase it, your Honor.

Q (By Mr. Cusack) Mr. Schmadel, could you tell why there is no statement in those letters specifically in regard to the differences in price which Falls City was charging Vanco and Falls City was charging Henderson, Kentucky [624] distributors?

A Yes, sir.

There is no mention of the price differential between the higher prices in Indiana and lower prices in Kentucky because both before and during the time these letters were being written Mr. Tate and Mr. Peter and I had been discussing this problem; the Falls City brewery was aware of it through our discussions. And I instructed Mr. LaRue to omit that from his correspondence because the Falls City brewery people did not want anything in writing on that subject.

Q By, "this problem", are you specifically referring to—

A Problem of the higher pricing in Indiana and lower price in Kentucky.

Q Did you ever have, meeting, sir, with Mr. Tate in connection with this problem?

A Yes, sir, I did.

Q Could you tell us when that meeting took place?

A To the best of my recollection there was a bill introduced in the legislature in the fall of 1973, and there was a hearing on—a Public Policy Committee hearing on that bill later on in that fall, and I talked to Mr. Tate between those two dates. I do not remember the exact date, but I went over to Mr. Tate's office at the brewery in [625] Louisville, Kentucky to talk to him about that particular problem and to request his support for that legislation.

Q What did Mr. Tate say to you, sir?

A Mr. Tate informed me that he was not interested in being that kind of competitor. The thing I had previously explained to him on that occasion, before he made that statement, was that the law would not apply to Falls City Brewing Company because they acted as their

own distributor; that the law as it was written and introduced would only apply to brewers who sold to distributors, and would prevent discriminating price against Indiana distributors, as against the price of that brewery to its distributors in adjoining states, and that since Falls City was distributing their own beer, were not selling to a distributor, they in their own area of Louisville, Kentucky would not have been restricted by this legislation, and the competing distributors of other brands in Louisville would be bound by this legislation and their prices would have to be the same as distributors similarly situated in Indiana, and that he could have a dominating position in the Louisville market by virtue of supporting this legislation.

That's when he informed me he did not desire to do, because he did not want to be that kind of a competitor.

[626] Q Would the effect of the bill be to raise the prices or at least equalize the prices between Falls City distributors in Indiana and Falls City distributors in Kentucky?

A It would have prevented a higher price being charged to an Indiana distributor than the same brewery charged for similar products through a Kentucky distributor; yes, sir.

Q Did it also apply to sales by brewers in states surrounding Indiana?

A Other brewers, yes, sir.

Q Which would be Illinois, Michigan, Ohio, and Kentucky; is that correct?

A Those states would have had distributors that would have been affected by these prices.

* * * *

[627] Q Mr. Schmadel, what assigned territory did Vanco have from August of 1972 through November of 1978 from Falls City?

A We have historically handled Vanderburgh County and three outlets in Posey County, Indiana for Falls City.

Q Does Vanco operate under a federal basic permit?

A Yes, sir.

Q In the sales of Falls City beer, with whom did Vanco [628] compete from 1972 through November of 1978?

A We competed with the distributors who were located in Evansville for business from wholesaler to retailer. The retailers located in Vanderburgh County competed with retailers located in the surrounding counties for business of the consumer.

Q What are these surrounding counties, sir?

A Warrick County, Indiana; Posey County, Indiana; and Gibson County, Indiana; and Henderson County, Kentucky.

Q From downtown Evansville—no, let me strike that. From where your warehouse is located in Evansville, which is the closest contiguous county?

A Henderson County, Kentucky.

Q From downtown Evansville, Mr. Schmadel, where is the closest contiguous county?

A Henderson County, Kentucky.

Q Mr. Schmadel, have you had occasion to personally observe—

THE COURT: By that, you mean that the city of Evansville does not occupy geographically the entire geographic county of Vanderburgh?

THE WITNESS: That's correct. The city of Evansville is situated directly on the river, as is Henderson County.

[629] THE COURT: So you are surrounded both landwise as well as on the river?

THE WITNESS: Yes, sir.

THE COURT: Proceed.

Q (By Mr. Cusack) In other words, Mr. Schmadel, the city of Evansville is located on the southern border of Vanderburgh County, abutting Henderson County, Kentucky?

A Exactly.

Q Mr. Schmadel, have you had occasion to personally observe Indiana residents bying [sic] beer in Kentucky?

A Yes, sir, I have.

Q When did you observe this?

A I first began to observe this in—I think the month was August of 1974, when the pictures were in the paper about the people who were arrested for hauling beer from the Bridge Boat Club back into Indiana.

Q Where did you go, sir?

A I went to Bridge Boat Club parking lot.

Q Where was that located?

A Underneath the Indiana side of the bridge, in the state of Kentucky.

Q What did you observe, sir?

A Parked my car in their parking lot. I watched for people who came in and bought beer and brought cases of empties [630] took cases full of beer out, and I noticed at that time that a good many—I would say majority—of those cars had 82 Indiana license plates, which means that they were from Vanderburgh County, Indiana. I noticed some Posey County, which are 65 license plates. I noticed some Warrick County, which are 87 license plates, and I noticed a few from Kentucky and a few from other states.

Q Do you know, sir, whether in 1974 Vanderburgh County retailers of beer could purchase beer cheaper in Henderson than Vanderburgh?

A I don't understand.

(The reporter read the pending question.)

THE COURT: Do you mean legally or illegally, Counsel?

Q (By Mr. Cusack) On the open market, sir.

A Yes, sir.

Q Mr. Schmadel, have you personally observed any other time Indiana residents buying beer in Kentucky?

A Yes, sir. Since the time in August of 1974 when Bridge Boat Club was the scene of a great deal of ac-

tivity I made it my business to check all of the outlets along the strip, and I quit watching the Bridge Boat Club after the high water washed it away. I don't think it's in business any more. But I watched outlets along the strip from then [631] on.

Q Direct your attention, sir, to Labor Day 1978, which was Monday, September 4, 1978. Were you in Henderson County, Kentucky at that time?

A Yes, sir; I was over there for about three hours.

Q Where were you, sir?

A Most of that time I was parked in the parking lot at House of Beverages in the Old Orchard Shopping Center, Henderson, Kentucky.

Q What did you observe, sir?

A I observed various people coming into the House of Beverages, buy beer. Some of them had beer in paper sacks, which I understood to be a small quantity; could not tell what brand that was. Some of the people carried beer out of the House of Beverages in Falls City cases. I took that to be Falls City beer.

I saw one man, that I noticed in particular, drive up with an 82 license plate on this car towing a boat trailer, with Indiana license on the boat trailer, with an open beer cooler in the boat. He got a case of Falls City beer out of the House of Beverages, put it in the beer cooler, went back to the House of Beverages and got ice and iced up his beer, and drove out of the parking lot on south down towards the southern part of Henderson.

[632] Q Now on Monday, September 4, 1978 did you observe any other retail outlet selling beer in Henderson?

A Yes, sir. I drove past all of them. I intended to drive into the Cap & Cork, which is a drive-in beer depot, but I was unable to get into the driveway there because Mr. Utley's truck was blocking the driveway while his driver was making a delivery. This was around noon on Labor Day.

Q By "Mr. Utley" you are referring to the Falls City distributor in Henderson?

A Yes, sir. Ronnie Utley.

Q Was your company open on Labor Day?

A No, we could not work that day.

Q That's because of your contract with the union?

A Yes, sir.

Q Did you buy any beer in Kentucky on that day, sir?

A No, sir, I didn't buy any beer on Labor Day at the House of Beverages, but I bought beer there on other occasions.

Q When was the last time that you bought beer in Kentucky, sir?

A I think I bought a six pack of Falls City beer in the House of Beverages in Old Orchard Shopping Center in Henderson County, Kentucky in August. This was a weekend in August that I went there.

Q August of 1968?

[633] A August of 1978.

Q Excuse me, '78?

How much did the six pack of beer cost you?

A Paid $1.39 for a six pack of Falls City canned beer at the House of Beverages.

Q At that time, sir, what was the retail price in Evansville for a six pack of Falls City beer?

A That same day I stopped two or three places in Evansville that I knew handled six packs of Falls City canned beer, and I didn't buy any but I checked the shelf prices and marked prices on that particular product for purposes of comparison, so that I would know what the differences would be.

Q What was the price?

A I didn't say what the Indiana price was.

Q Would you tell us what the price was?

A The Indiana prices varied from $1.65 to $1.69 without tax. The price I paid in Henderson was $1.39 including tax.

Q Were Indiana retailers open last Labor Day, sir?

A Yes, sir.

Q Mr. Schmadel, just one moment, please.

Mr. Schmadel, when was the last time that you visited the stip [sic] in Henderson, Kentucky along Highway 41?

A If today is Thursday, it was a week ago yesterday.

[634] Q Would that be May 8?

A I think so; yes, sir.

Q Did you compute the mileage from the House of Beverage to the nearest shopping center in Evansville?

A Yes, sir, I did.

Q Could you tell us what the mileage is, sir?

A Five miles.

* * * *

[636] Q Did you attempt to sell Vanco Beverages in 1974, Mr. [637] Schmadel?

A I attempted to sell Vanco Beverage as a business in both 1973 and 1974.

Q What prices were you offered?

A I attempted to do business with Pepsi General, a division of IC Industries, and that gentleman offered me a million three for the good will. That was not enough in my estimation, and I did not accept that offer.

I was later offered by a group of people including Mr. Dauble, and Mr. Dauble informed me that the good will of my business was worth $1,100,000, which I decided was not enough, did not accept.

THE COURT: What year?

THE WITNESS: One was in 1973 and one in 1974.

Q (By Mr. Cusack) What was Mr. Dauble's offer?

A One million one.

Q Which year?

A One in 1974.

Q And the IC Industries offer, was that in 1973?

A As best I recollect, yes, sir.

* * * *

[639] Q Mr. Schmadel, did you ever attempt to get the Indiana legislature to pass the law in regard to prices which brewerys [sic] charged to Indiana wholesalers?

A Yes, I did.

Q Was such a bill introduced in the Indiana State Legislature?

A Yes, sir.

* * * *

[640] Q (By Mr. Cusack) When was the bill introduced, Mr. Schmadel?

A There was one bill introduced in the preliminary session of the legislature in the fall of 1973, for the introduction of bills to be considered at the 1974 short session.

Q Who introduced this bill, sir?

A Representative Schutz, from Evansville.

Q Did you attend a hearing in connection with that bill?

A I did, sir.

[641] Q Did you observe any representative of the United States Brewers Association testifying in regard to this bill?

MR. ADLER: Here I do object.

* * * *

[647] THE COURT: My observation of it is, Counsel, just for example not to limit it to that Defendant's Exhibit FC-1—the entire exhibit, but I want to emphase [sic] the first grammatical rhetorical paragraph of the letter to Mr. Schmadel of July 17, 1973 from the general salesmanager, Mr. Peter, of Falls City Brewing Company, defendant in this case. Copies were sent to MR. LaRue, an executive of the plaintiff, and Mr. Goetz, Tate, Schnatter, executives of the defendant. The whole content of this exhibit is taking issue with the plaintiff by Falls City, that their sales were falling off, and trying to explore as to why they were falling off, an exchange of letters.

Then finally the observation here in that grammatical paragraph, "Falls City sales experience for the same [648] period of time in the rest of the State is much better than that"—

MR. ADLER: Well—

THE COURT: "—than that of Vanco."

Now everybody has been holding their head in the sand here in these letters with respect to even examining whether there was any issue between the parties about lower prices in Henderson from Falls City to their distributors, or the sales from consumers from the retailers, than that of the sale to the wholesaler in Indiana and the ultimate sale of the retailers' to customers in the State of Indiana and Vanderburgh County and its environs.

Whereas, as a matter of fact, at the same time—as I have heard evidence here—that there was discussion between this witness and an executive at about the time of these letters on the ongoing—concerning the differential of price, and verified by the witness here saying that he's submitted a bill to the legislature to seek to get state action in the matter. Now he is seeking to produce evidence to show that Falls City even knew of it because they were a party—Well, he testified he went to Falls City executives and asked them to assist in it and testify before the legislature.

And as often happens during a trial, the jury sees [649] things many times, as does the trier of the fact, the judge, things that go on in the courtroom that sometimes go on behind the lawyers' back. Your Mr. Tate set at the table and shook his head in a great big negative and reached over to try to—

MR. ADLER: Shaking his head is not on the record of course, your Honor.

THE COURT: I don't hide my head in the sand. I am putting it in the record right now, see?

For example, this talk to Mr. Tate in Louisville, Kentucky about the very observation—now I believe that this is admissible. I am going to quote Noerr and its progeny in authority, that they have every right constitutionally to go to the legislature to seek official action and to defend themselves against such official action, but obviously this legislative action here could not control

what happens in the state of Kentucky. It was exclusive to that, of what happens in Indiana.

I would admit it solely for the purpose of showing knowledge of the effects of such—that there was a price differential, and secondly that of the effects upon the parties in Henderson and the Vanderburgh County area.

I intend to follow Noerr to the fullest extent, and those cases following it. The fact that they had [650] organized in and of itself is not sufficient under Noerr and the cases succeeding it to prove violation of the Sherman Antitrust Act nor the Clayton Act, which is a subject of Count II.

And the objection is overruled. There is some relevancy in the issues to get this answer.

Now it calls for a yes or no answer, first. It is an answer that would not be of harm to anybody, because it's merely introductory, but we resolved it and the answer calls for a yes or no answer. If he says no, we are done with it.

Now read the question, Mr. Oesterreich.

(The reporter read the pending question, as follows: "Did you observe any representative of the United States Brewers Association testifying in regard to this bill?)

A Yes.

Q (By Mr. Cusack) What was his name, sir?

A Dave Finney.

* * * *

[651] Q Now what did Mr. Finney say?

A Mr. Finney spoke at the Public Policy Committee hearing that I referred to in violent and direct opposition to the Price Discrimination Bill, at the same meeting, in my presence, at which I spoke in favor of that bill in his presence.

[652] MR. ADLER: I object to the characterization and move to strike the characterization. I think it would be appropriate for the witness to testify—

THE COURT: Would you follow it up? Otherwise it might be objectionable.

MR. CUSACK: I will move to strike the word "violent". Move to strike the work [sic] "violent"; is that your—

MR. ADLER: "Violent" and some other color word.

THE COURT: Would you have him explain what he meant by—

Q (By Mr. Cusack) Would you explain what he meant by the answer?

A By the word "violent"?

Q The word "violent".

A Mr. Finney, sir, used language which left no doubt in anybody's mind present at that hearing that he was absolutely opposed, and his association was opposed to this legislation and the objects that it attempted to accomplish.

Q Did Mr. Finney indicate this was the unanimous position of the United States Brewers Association and its members?

A Not directly, but by implication he did.

[653] Q Mr. Schmadel, would you tell us what financial difficulties Vanco has encountered from 1972 through 1978?

A In 1972 we were experiencing a gradual loss of business, just about the same as most other Falls City distributors, in our Falls City volume. Our prices charged to us by Falls City were higher than the prices charged in Henderson, Kentucky. There were some retailers who were selling more beer to consumers because of that, but it wasn't a thing that was called to my attention by the extent of it.

Then shortly after there was a price—federal price freeze on prices and wages. About that time and shortly after—and early in 1973—and shortly after that was over we began to notice more traffic in consumer purchasing across the river in Henderson County, Kentucky.

But after the price freeze was in force our costs had gone up through built-in escalator labor contracts and all

other costs, so that we found ourselves in a position where we needed to increase our prices at that time.

Now early in 1973 we were considering raising prices. Other distributors, including Falls City distributors, around the state had increased their prices because of the simple economic pressure. Now when Mr. Peter found out that we were considering raising our prices he came down [654] to see me and told me that, "Earl, if you raise your prices we will have to raise our price to you and take it away from you." I of course did not agree with him, didn't tell him anything at all, but shortly after that we did in fact increase our prices to our retailers. The brewery promptly—Falls City promptly increased their prices to us by a lesser amount, and seven months later increased their prices to us by an additional amount, which created the situation where we were suffering a financial loss greater than we had suffered before.

Q This was 1973?

A And into 1974.

And at that time we were again forced by simple economic pressure of our costs to increase our prices. At this time Falls City increased their prices to the Henderson County distributor the first time. You understand, they increased their price to us twice; the second time they also increased in Henderson County, Kentucky, but he at that time was gaining so much business that by some method unknown to me he, as he testified here, absorbed that increase, kept his prices down, thereby dramatically increasing the number of people who went across the river to take advantage of the prices, which were then almost a dollar something, dollar and some cents, more than a [655] dollar a case cheaper than our retailers could maintain in Evansville, Indiana. That's when the people got arrested for bringing beer back into the state that Mr. Seits talked about.

That's when I started looking to see just who was going over across the river, buying beer. I went to the

Bridge Boat Club to see if some of our retailers were hauling beer in pickup trucks, which I had information they were, but I couldn't see, don't know that.

But there was a dramatic increase in our loss of business and a consequent dramatic increase in our loss of profits, because our profits are geared directly to the amount of beer we sell. And we lost a great deal of business then, and that continued up until today, because the prices are still different. And the buying habits of the public, when they are changed by some dramatic instances such as a great price difference in July, August and September, 1974, tend to continue unless there is something dramatic that causes them to change back. We are still experiencing this same loss of business that we experienced before. Prices are still lower in Indiana than they are in Kentucky.

* * * *

[656] Q (By Mr. Cusack) Mr. Schmadel, at any time from 1970 through November 1978 did you have any knowledge or information in regard to the rankings of beer sales in Vanderburgh County, Indiana?

[657] A Only so far as they would apply to Vanco and various brands Vanco distributed. I would have exact knowledge as to that, but not at [sic] to the other distributors.

Q Well, could you tell where among the Vanco brands Falls City ranked as of November 1978?

MR. ADLER: I don't understand. Are you asking the witness to testify where the Vanco brands—

MR. CUSACK: Where Falls City ranked among the brands that Vanco distributed. He would have knowledge of that.

THE COURT: Now read the question.

(The reporter read the pending question.)

A Yes, sir, I have exact knowledge of that.

Q (By Mr. Cusack) Could you tell us, sir?

A I can tell you, if I might be permitted to refresh my memory.

Q You certainly may.

A Sir, I have the accumulated figures for the entire year of 1978, and the ranking of Falls City among all of the brands we sell, brand by brand, was first.

Q What is second?

A Drewry's.

Q What percentage in 1978 of Vanco's total sales of Falls City beer, in 1978, approximately?

[658] A In 1978 we sold 124,101 cases of Falls City beer, by brand, out of a total of 560,378 altogether, all brands.

Q That would be about 20%?

A My mathematics is not quite that good; I don't know. Those are the exact figures.

Q All right.

Direct your attention to 1972, Mr. Schmadel. What percentage of all Vanco's brands of beer were Falls City and Drummond Brothers Beer?

A More than half.

Q More than 50%?

A Yes, sir.

Q Mr. Schmadel, have you been forced to borrow money personally for Vanco Beverage?

A Sir, after the partial dissolution of the corporation in September of 1977 the corporation was forced to get money for operating capital by borrowing from my wife and by borrowing from the bank on loans secured by my wife and myself as personal guarantors, and by financing through the banks, commercial financing the fleet of trucks that we had and to which we added the Sterling fleet acquisition. Yes, sir, we borrowed money wherever we could find money to borrow.

• • • •

[659] Q Did you ever speak with any executive of or employee of the Falls City Brewing Company in an attempt to elicit from that employee why Falls City charged higher prices to distributors in Indiana than in Kentucky?

A Yes, I did.

Q In that attempt who did you—

THE COURT: When?

Q (By Mr. Cusack) When was this conversation? [660] A It was in the summer of 1973, during the course of my gathering material which I intended to present to the legislature at the Public Policy Committee hearing that fall.

Some time that summer before that I called other distributors in other states in an attempt to find out just what they were paying for the various products, including Falls City beer. I called a distributor that I know, known as Rooster Williams, a Falls City distributor in Cookeville, Tennessee, and asked him what he paid Falls City net FOB for beer, and—

* * * *

Q (By Mr. Cusack) Who did you talk to from Falls City?

A I talked to a man who called me, that I knew to be the Falls City district manager in Kentucky and parts of Tennessee.

[661] Q What was his name, sir?

A Mr. Frank Fuson called me on the telephone.

Q What did he say to you?

A Mr. Fuson—

MR. ADLER: Excuse me. May I consult here a moment?

THE COURT: He needs to consult.

MR. ADLER: I think we'd like more foundation as to how Mr. Schmadel knew he was an employee of Falls City.

MR. CUSACK: He objected to the question in regard to the conversation of Rooster Williams. Let me pose that question, and we can explain why Mr. Fuson called Mr. Schmadel back.

THE COURT: The objection is overruled. That's cross-examination. He has testified under oath he had talked to the man on the phone that he, the witness, un-

der oath says he knows is the district manager for the defendant, and that's sufficient to qualify the testimony.

Proceed.

Q (By Mr. Cusack) When the man telephoned did he identify himself?

A Yes, sir.

After my conversation with Rooster Williams Frank [662] Fuson called me immediately from Rooster Williams' office. He was there at the time I had talked to Rooster, and called me right back and identified himself.

Then he told me, "Earl"—this is a direct quote—"Earl, you should not bother Rooster about his prices, because he's got a local tax that he has to pay, and he is entitled to a special FOB price because of that, and you boys in Indiana get more for your beer and you are entitled to pay more," unquote.

* * * *

[671] Q (By Mr. Cusack) Is there a deposit charged by Falls City on a case of returnable bottles, sir?

[672] A Yes.

Q During the relevant time period what was that charged to Vanco?

A During 1972 and '73 and for some time after that the charge was the normal charge customary in the industry of sixty cents a case.

Q What was the deposit charged to Mr. Utley?

A Mr. Utley during all this time had a—

THE COURT: Does he know?

Q (By Mr. Cusack) Do you know what the charges were to Mr. Utley?

A Yes, sir.

THE COURT: How does he know?

Q (By Mr. Cusack) How do you know that, sir?

A I bought some and paid it.

Q When did you do that?

A Sir—

MR. ADLER: At some point, I'd like to interject an objection.

THE COURT: Let's read it.

Q (By Mr. Cusack) When did you do that, sir?

A About a year ago.

Q What was the deposits on that beer?

A 84¢

[673] Q All right. Did the fact Mr. Utley had 84¢ a case deposit and you had a 60¢ a case deposit, did that have an adverse effect on your business?

A Yes, sir, it did.

Q Could you tell what that was, sir?

A Because a consumer who lived in Evansville and had a case of empty bottles, Falls City bottles, for which he had paid my retailers 60¢ could take that case of empties over to Kentucky and not only get a cheaper price for the beer but could get an extra 24¢ out of returning that case of bottles.

Q Did Vanco experience any problems getting back its deposits on beer, getting back its returnable bottles?

A Yes.

Q What was the reason for that?

A Because some of the people who had been on picnics, parties, and the like in the area south of Henderson would drop their empties off at Henderson and get 24¢ for each case more than they had paid for them when they ought [sic] them in Evansville, and we would continually have empty shelves, which is the case without the bottles. We would have a surplus of empty shelves to return to other breweries without any bottles, and the brewery criticized us for that.

* * * *

CROSS EXAMINATION

* * * *

[695] Q You've identified the movement of people from Evansville over to Henderson to buy their Falls City beer as the cause of Vanco's financial difficulties; is that correct?

A One of the contributing factors; yes, sir.

Q Is it your testimony today that it is only one of the contributing factors?

A Well, sir, we have experienced losses of volume on Falls City beer the same as everybody else in Indiana that are not adjacent to Henderson County, Kentucky.

Q In other words, the fall of volume of Falls City has been pretty much all over, hasn't it?

A Yes, but not the same all over. It's been worse for us.

• • • •

REDIRECT EXAMINATION

• • • •

[753] Q Mr. Schmadel, Mr. Adler on cross-examination showed you a document in regard to your retail and your FOB brewery prices, which is FC-54. Would you take a look at that, sir?

Do you have that, 54?

A Yes, sir, I have it.

Q And Mr. Adler stated that you didn't reduce your retail prices. Would you please examine FC-54, and would you take a look at the change in your retail prices from January 2, 1976 to July 1, 1976?

A Yes, sir. That shows a reduction from one date to the other of 25¢.

Q All right.

And you changed the 24/12 ounce export—reduced it from five dollars ten to four and eighty-five cents; isn't that correct?

A That's correct.

Q What was your reduction on nonreturnable 24/12's?

A 50¢.

Q From $5.65 to $5.15?

A Yes, sir.

Q And what was the reduction on 24/12 ounce six pack cans?

A 50¢.

[754] Q From $5.85 to $5.35?

A Yes, sir.

Q What was the reduction on the nonreturnable 12/32 on quarts?

A 50¢.

Q So—I am sure Mr. Adler wasn't trying to confuse you—you did in fact—Vanco Beverages did in fact reduce its retail prices in 1976, did it not, sir?

A Yes, sir. In 1976 we went back to the 1974 prices.

Q Directing your attention, sir, to the top of that exhibit, this also shows, does it not—this is a Falls City exhibit—that from January 2, 1972 to January 2, 1974 your company increased its retail prices not one red cent on Falls City beer?

A That's correct, sir.

Q Thank you.

Mr. Schmadel, I show you Plaintiff's Exhibit 99-2, which Mr. Stephens introduced into evidence. Would you please tell us how much money in 1972?

I'm sorry, correct: That's PX-88—PX—88-2.

THE COURT: You mean trial exhibit, or production exhibit?

MR. CUSACK: Trial exhibit, your Honor. Trial Exhibit 88-2. Mr. Hirshfeld advises me he referred [755] to it as the second page of Plaintiff's Exhibit 88.

THE COURT: The record will appreciate that.

Q (By Mr. Cusack) What was the profit or loss of Vanco in 1972, sir?

A I show—or see on here a loss of $72,448.

Q What was the loss in 1973, sir?

A I show a loss in 1973 of $4,681.

Q Was [sic] was the situation for 1973, sir? I mean 1974, excuse me.

A For 1974 this document shows an operating income of $16,510.

Q What is the figure for the next year, sir, 1975?

A Shows a profit of $4,268.

Q What year was that?

A That was '75.

Q What was the figure for 1976?

A For 1976 it shows a net loss of $205,229.

Q Wasn't that the year, Mr. Schmadel, that Vanco reduced its retail prices on Falls City products?

A Yes. We reduced them 50¢ across the board.

Q What are the profits or losses for 1977, sir?

A 1977, I show a loss of $62,131.

• • • •

[762] Q (By Mr. Cusack) Following your testimony before the State of Indiana House committee in regard to the price discrimination bill did you receive any contact or any communication from anyone from Falls City Brewing Company?

A Yes, sir, I did, the following morning.

Q From whom, sir?

A Mr. George Goetz.

Q His position at the time?

A He was president of Falls City Brewing Company in Louisville, Kentucky.

Q Did Mr. Goetz call you?

A He called me from his office, to my office, at which time he was very angry with me and told me that I did not have any business speaking for Falls City or disclosing any [763] Falls City prices in Indiana or Kentucky or elsewhere; that that was strictly Falls City business and I should keep my nose out of it, and that if in the future I spoke for Falls City that I was to clear it with him.

MR. CUSACK: Thank you, your Honor.

THE COURT: Cross-examine.

MR. ADLER: None.

THE COURT: You may step aside.

(The witness was excused.)

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DIRECT EXAMINATION OF DAVID D. FINNEY

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[768] Q (By Mr. Cusack) Mr. Finney, the Anheuser-Busch Company is a member of the United States Brewers Association, is it not?

A That's correct, sir.

Q And is Schlitz?

A Yes.

Q And Pabst?

A Yes, sir.

[769] Q And Falls City?

A Not—Falls City?

Q Prior to November 1978.

A —To the best of my knowledge they were members.

Q And Stroh?

A Yes.

Q And Miller?

A Yes, sir.

Q And G. Heileman?

THE COURT: You understand, we are bucking time here, and I just admitted an exhibit. I assume that that has all those names there. This is pure repetition. Let's move it.

MR. CUSACK: Yes, your Honor.

Q (By Mr. Cusack) Mr. Finney, did you testify in opposition to House Bill 1013 before the Public Policy and Veteran's Affairs Committee on January 8, 1974?

A I did, sir.

• • • •

[770] Q (By Mr. Cusack) And was your testimony in opposition to the bill?

A Yes, sir.

Q And was that testimony of yours communicated to the members of USBA?

A That question I can't answer.

Q Were the members of the USBA at that time aware that you on behalf of the USBA were taking a position in opposition to the bill?

A Yes, sir.

Q All right.

Subsequent to that time you have also testified or sent letters to either the Indiana Alcoholic Beverage [771] Commission or various other state bodies in opposition to any Indiana price discrimination law or regulation, have you not, sir?

A That's correct, sir.

Q And has that been under the direction—has that opposition been under the direction of the USBA?

A Yes, sir.

Q All right.

A Under my—my judgment here.

Q In opposition to legislation or appearances before legislative bodies or in front of the Alcoholic Beverage Commission or Legislative Study Committees?

A Yes.

Q You have been directed to do so by the USBA, have you not?

A Yes, sir.

Q And it's a fact, isn't it, the position that you have taken on behalf of USBA has been known to its members? Isn't that correct?

A Yes, sir.

THE COURT: Start at the beginning, Counsel. Ask him if the members were notified of the onslaught of the legislature on dual pricing first, and then what they did, what kind of a notice, what kind of [772] response they got if any, and so forth.

Q (By Mr. Cusack) Were the members of USBA notified of these bills pending in the Indiana Legislature in regard to dual pricing or discrimination?

A Yes, sir. We have legislative services out of Washington that's advised them of all pending legislation pertinent to the industry.

Q All right.

A These two particular bills?

Q Talking about this particular bill before the Indiana Legislature, as to which you testified in January of 1974. Were they notified in regard to that bill?

A I categorically cannot say. I would assume and expect that they were notified.

Q Did any of the members of the USBA voice opposition to the USBA opposing that legislation?

A Not to my knowledge.

Q Do you know whether Falls City Brewing Company specifically opposed that legislation?

A Not to my knowledge.

* * * *

[775] Q (By Mr. Cusack) Since 1972, through November of 1978, [776] your employer, the United States Brewers Association, has opposed the passage of any anti-price-discrimination or dual pricing bill or regulation; isn't that correct, sir?

A They have opposed price affirmation in Indiana, sir.

Q As I understand the legislation which was proposed in House Bill 1973 and House Bill 1013, it was a proposal that brewers not charge higher prices, FOB prices, to their wholesalers located in Indiana than their wholesalers located in surrounding states. Isn't that correct, sir?

A That is correct.

Q All right now, at all times Falls City was in accord with the position of USBA; isn't that correct, sir?

A To the best of my knowledge.

Q Let me show you what is already marked as Plaintiff's Exhibit 28, which is a copy of a letter dated October 29, 1976 from James F. Tate to Mr. Henry V. King, beginning "Dear Henry: Enclosed you will find a Xerox copy of all the information we have received from John T. Cusack." And to that is attached a letter from me dated October 27, 1976 to Mr. Tate, to which is enclosed a draft complaint. I hand that to you.

MR. CUSACK: I move the admission in evidence of Plaintiff's Exhibit 28.

* * * *

[783] MR. ADLER: I have the same objection, your Honor.

THE COURT: I still don't understand your objections.

MR. CUSACK: Again, your Honor, this has nothing to do with legislation. This is in regard to an ongoing assistance given to the defendant in this lawsuit by other brewers similarly situated, desirous of keeping prices higher in Indiana, and has nothing to do with a petition to the legislature.

* * * *

[791] MR. CUSACK: Your Honor, if there is any support from the United States Brewers Association and its members in the defense of this lawsuit, then it is sub rosa. They have made no appearances here; they are not parties to this litigation. One of the theories of our conspiracy, your Honor, is in fact that USBA is supporting the defense of this lawsuit because the results of it would be to change the price system that has existed for so many years, whereby the brewers charge higher prices in Indiana than other states. We think it is clear that such conspiracy exists, as Mr. Tate has admitted that he not only consulted with Mr. King in regard to this lawsuit, but counsel for the USBA came to Louisville and discussed the matter with him and Mr. King. Mr. Tate presented this problem before the Board of the USBA, and that is the only minutes that has been produced to us in connection with the matter.

It is clear that there is joint interest between Falls City Brewing Company and its brewer competitors in regards to the outcome of this lawsuit, and we believe it is part—shows a price fixing conspiracy on the part of [792] the brewers. Nothing—

THE COURT: The objection is overruled, and Exhibit 29 is admitted and exhibited in evidence.

* * * *

DIRECT EXAMINATION OF JAMES F. TATE

* * * *

[932] Q Now, Mr. Tate, in what state did Falls City sell its beer? What was its marketing area?

A Marketing area of Falls City was Illinois; we had one distributor in Missouri; Indiana; Ohio; West Virginia; Kentucky; Tennessee; and Virginia. When we came out with Billy Beer we had distributors in Florida, Georgia, North Carolina, but basically it was in those other states.

Q Did any of those states require that all brewers have only one price at which to sell all distributors?

A We sold beer in two states that had such a law. One was Indiana and the other was West Virginia, required you to sell all distributors in the state at the same price regardless of their size or their distance from the brewery.

Q Now Falls City itself, did it have a single price in all the states in which it marketed?

A Yes, sir.

Q Was that policy in effect at the company when you joined it?

A Yes, sir, it was. It had been the policy of Falls City Brewing Company, they told me, as far back as it went: Just one price in every state.

Q Did you yourself consider whether that was an appropriate [933] policy for Falls City to have?

A I thought Falls City had that policy a long time, and I thought it was a little presumptuous for me to come in and, you know, try to change everything at one time. We tried to switch with small problems, changed one little thing at a time, but we kept that policy.

* * * *

[934] Q In Louisville.

A Yes, sir. We had some states where we had to pay—a part of our cost was paying the tax to the state. Some states we did not pay any tax, any state tax.

Q Is it your understanding that a distributor who buys—Kentucky distributor by law must sell in Kentucky and one in West Virginia in West Virginia? Is that correct?

A Yes, sir. As I understand it, every distributor, number one, has to have a federal permit and a state permit, and in some cases even city permits, but we had to know every one of our distributors has a federal permit as well as the state permit, and so we came in we knew that he was buying a produce for sale in a particular area, in a particular state. Otherwise I think he would have lost his federal permit.

Q Now let's talk about how Falls City determined the price of its beer. Were there different prices for distributors from each state?

A Different states had different prices. There were some—in fact one small factor could have been the state tax. In Indiana, as I stated, by law every distributor that we sold we had to sell at the same price, whether it was Jeffersonville or South Bend, Indiana, and regardless of the volume of beer that he took from our plant.

[935] We were a very small brewer, and I can—at least since I have been with the brewery we have never been the first to increase our price. We follow prices as closely as we can as to what's going on in the marketplace. We had the same problems and the same cost problems as any other brewery would have, and since we were in competition with Pabst and Strohs and they were the leaders in the marketplace in Indiana as well as Kentucky and Ohio—and as a matter of fact, the same two brewers in West Virginia—we sort of followed along with what Pabst and Strohs did, in most cases.

Q What would have happened if, say, in the state of Indiana you had increased your price when Pabst and Strohs had not?

A I think it would have been disastrous for the brand to have raised our price when Pabst and Strohs, who were much larger sellers of the product in Indiana than we, if we had raised our price. I think we would have destroyed ourselves even quicker.

Q So how did you ascertain what was happening in the marketplace so far as pricing by Pabst and Strohs?

A Well, we are in the same house with many distributors around the state of Indiana that handles Strohs, handle Pabst, handle Schlitz, Budweiser, and it is not hard to [936] get information.

When a brewery makes an announcement it may be in an individual letter to an individual brewery, but it very quickly becomes public information as far as beer salesmen are concerned. They go in, and we have had calls from Vanco Beverage, informing what Anheuser-Busch had done to the price.

Q When you learned that Pabst or Strohs was raising the price, what did you do at Falls City?

A We would sit down, get our pencils going, and see what we could justify as to price, and be sure we try to follow them as quickly as possible.

Q Now there was testimony by Mr. Schmadel of a conversation he had with Mr. Peter in which Mr. Peter is reported to have said that if Vanco raised its price to its retail customers Falls City would come in and raise the price to Vanco and take away part of that increase. Is that something that you believe would have happened, Mr. Tate?

A No, sir, I do not.

MR. CUSACK: Objection, your Honor. No foundation has been laid. Move to strike the answer.

THE COURT: The answer is stricken.

* * * *

[940] Q Could Falls City have made a decision to raise the price in the entire state of Indiana because of

the pricing policies at the wholesale level of any individual distributors?

A No, sir.

Q Why not?

A Because it would have affected us with every other distributor in the state of Indiana. We are not going to let one distributor run our business.

Q And had you raised the state price in Indiana, what effect would it have had on your business vis-a-vis your competition?

A I do not think we would have been competitive with Strohs and Pabst and Sterling, who have a product we have got to stay competitive with in order to stay in business in Indiana.

Q Now I believe your testimony has been that in the state of Indiana you followed Strohs and Pabst, or possibly those would be your principal competitors.

A Yes, sir.

Q And if they raised the price you will probably raise yours?

A Yes, sir.

[941] Q If they don't raise the price, what happens?

A We don't raise ours.

Q Now—

THE COURT: What is the likelihood, if your company would raise the price, in your professional opinion, what would be the attitude and conduct of the other competitor brewers then? Would they raise it to equal yours?

THE WITNESS: I have not ever known a small brewery our size to step out and lead the parade.

THE COURT: All right.

Do you think it would have been detrimental?

THE WITNESS: We could have sat there a week or two, and we'd be sitting on a limb by ourselves, losing a great deal of business.

THE COURT: Before we leave this subject, there was also some testimony in plaintiff's side of the case

from Mr. LaRue, I think it was, that someone in Falls City did make some change in Clark County or Jeffersonville to accommodate that distributor.

Q (By Mr. Adler) Do you have any knowledge of any such incident, where an individual distributor in Indiana would have been given some kind of a special allowance?

A No, sir.

* * * *

[944] THE COURT: What else did he do in the investigation?

Q (By Mr. Adler) Did you examine company records to see if there was anything in the records?

A Yes, sir. There was nothing in our company records of any special—anything having to do with Jeffersonville.

Q What would have been the legality of such?

A It would have been illegal.

MR. CUSACK: Move the [sic] strike the answer, that and the previous answer of the witness, on the grounds it's double hearsay.

THE COURT: Overruled. The only thing he said was that he checked records and could find nothing in the say [sic] of special favors.

Next question.

Q (By Mr. Adler) All right now, let's leave Indiana, where you've described the conditions there that affected the pricing of Falls City.

What brewers are leaders in Kentucky?

A Again, Pabst and Strohs back in 1972, -3, -4, -5, -6.

In 1977 Miller began to jump up just like they did in the state of Indiana, and I would guess that today Miller [945] Brewing Company is number 1, and Pabst and Strohs are second and third.

And they were the competition of Falls City, because we sold in the same price bracket.

Q Is your price in Kentucky lower than your price in Indiana?

A Yes, sir.

Q How does the price of your competitors in Kentucky compare with the price of your competitors in Indiana?

A They are all lower in Kentucky than they are in Indiana.

Q What would be the consequences to your business in Kentucky if you were to put your price above the level of your competitors and price it at the same level as the Indiana price?

A Well, it would put us in the premium price bracket, which we weren't able to get. We were a regional price beer, and that would have put us under a long time ago.

Q Now how, in Kentucky, did you go about determining what your competitors' prices were?

A The same as we did in Indiana. We have regional salesmen that visit with our distributors, and all our distributors in Kentucky handle more brands than just Falls City, and we can—it is not hard to get another brewer's price.

THE COURT: Did it require consent of [946] Indiana Alcoholic Beverage Commission to reduce your price of the product to that of the price to the distributor in Kentucky?

THE WITNESS: The question? Could you read it?

THE COURT: Read the question.

(The reporter read the Court's question.)

THE WITNESS: No, sir.

Q (By Mr. Adler) Could you have lowered your price in Indiana to the Kentucky level for any one distributor without lowering the price throughout the State?

A No, sir.

MR. ADLER: I don't know if that's what you were—

THE COURT: No. If he didn't want to raise the price in Kentucky, why couldn't he lower the price here? I want to find out about that.

Q (By Mr. Adler) What would have been the consequences of lowering the price in Indiana to the Kentucky price level?

A Well, I think maybe on a temporary basis we could have picked up a little bit of volume, but I don't think the volume we would have picked up would offset the dollars we gave away from the price.

[947] Q In order to do that you would have been below a competitor's prices?

A Probably every one of them.

Q Would that have been true throughout the state of Indiana?

A Yes, sir.

Q Do you have any—

Well, as a matter of business practice you chose not to price your Indiana beer below the level of your competitors?

A Right. Yes, sir.

Q Going back to Kentucky, do your competitors have a single state-wide price in Kentucky?

A In 1972, when the Alcoholic Beverage Commission of Kentucky made all the brewers hand in their prices, submit prices to him, we got all those prices and the Miller Brewing Company and the Stroh Brewing Company had one price throughout the state of Kentucky, just as Falls City Brewing Company had one price throughout the state of Kentucky.

Other brewers' prices varied all over the lot in the state of Kentucky, distributor by distributor.

Q Well, how did you know that the price you set for Kentucky—

[948] You and [sic] a single price throughout Kentucky?

A Yes, sir.

Q Was that exactly equal to the prices of your competitors?

A No, it wasn't, couldn't have been, because they had all kinds of price in the state of Kentucky, and we had one price in the state of Kentucky.

I think it was a pretty good approach and average or a little above average of the prices across the state of Kentucky.

THE COURT: Well, the price is FOB and at your dock. Why is the Indiana price higher than Kentucky under the policy of your company?

THE WITNESS: Well, because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned.

THE COURT: All right.

Q (By Mr. Adler) So that would Pabst or Strohs or your other competitors also have a different price for their Indiana distributors than they would have for their Kentucky distributors?

A Yes, sir.

Q That would be true for the distributors who have bought from the same brewery?

A Well, the Kentucky distributors of any brand got a cheaper [949] price than Indiana distributors of the same brand.

Q That's general industry—

A Yes, sir.

Q —practice?

A Yes, sir.

Q Now did you from time to time make an attempt to determine whether your Kentucky price was in line with the prices of your competitors, were no lower, for example, than it had to be in order to be reasonably competitive?

A Well, as I said, our salesmen brought in Xerox copies of other brewers' prices, price quotation to distributors. It was this kind of information that we used to stay competitive price-wise in the marketplace.

Q You referred earlier to the state of Kentucky in 1972 calling for price information from all brewers. Was that—

A Yes, sir.

Q Was that something that—Did you get that information?

A Yes, sir.

Q I'd like to show you Defendant's Exhibit FC-28 and ask you what that is.

A These are all the prices of all the breweries that were doing business in Kentucky, submitted to the Department of Alcoholic Beverage Control, State of Kentucky. The day [950] they were submitted I had our city salesmanager to go to Frankfort and make a copy of every one that was submitted.

Q Did you make any attempt to determine whether your price was in line with the competitors' prices?

A Yes, sir.

Q And did you make any notations on that exhibit that would indicate whether you were above or below the competitive prices?

A Yes, sir.

Q What do they show?

A Well—

THE COURT: The first page of the exhibit?

A (Continuing) Yes, this is Falls City's one page that we put in, because we sold all our areas at the same price.

Q (By Mr. Adler) Are those your handwritten notes?

A These are my handwritten notes, sir.

On this particular page, I was curious as to what the Strohs' distributor was selling beer to the local distributor for and what the Pabst distributor was—his dock price was in Louisville, and I found out that we were actually 24¢ above Strohs on the export; and on 24/12 ounce cans we were four cents higher than he was. Our [951] state price was fourteen cents on 4/6 cans. The other one was the loose pack. On the 16 ounce cans, we were 7¢ higher than he was. On the 4/6 NR's, nonreturnable bottles, we were 23¢ higher than he was.

Q Well, in general from that analysis, what did it show?

A Shows that Strohs was cheaper all over the state of Kentucky than we were.

Pabst, on the other hand, had some prices that were higher than ours. Also, there were some that were lower.

Now they handed in a price sheet that they had 15 different distributors in the state of Kentucky, and on exports there is a price ranged from $1.83 to $2.20 on the same package in the state of Kentucky.

THE COURT: How's the quality of businessmen as distributors for Strohs compared with yours in the state of Kentucky?

THE WITNESS: The quality of businessmen who handle the product?

THE COURT: At the same time you were referring to, there.

THE WITNESS: I think that the distributors that handle Strohs throughout the state of Kentucky were as good as the distributors that were handling Falls City in the State of Kentucky.

[952] THE COURT: Why do you figure the price was lower than yours, then?

THE WITNESS: I think one of the reason was that Strohs was probably lower than us, sir, was because of the distance from Detroit into Kentucky, and we were in Kentucky, would have made a part of that difference, I think.

THE COURT: Why would that factor make a difference.

THE WITNESS: Because of the distance, hauling.

Q (By Mr. Adler) Now subsequent to 1972 have you continued to try to keep abreast of the market, see that your prices are in line in Kentucky?

A Yes, sir, we have.

Q Now in determining your Kentucky price have you ever been under pressure from a large wholesaler in Kentucky to set the Kentucky price at a level lower than in any other state?

A No, sir.

Q How have you made your pricing decisions in Kentucky?

A With the information that we get from our district men that are out in the state, and our information they get form [sic] distributors that are handling our products and [953] others.

Q Now Mr. Schmadel testified yesterday about a conversation with you. I believe in the fall of 1973 he came to Kentucky and asked you, I believe, whether you would support an antidiscrimination law that would mean that a brewer's price—that would deal with the problem of brewers having different prices for different states. Would you tell the Court how you recall that conversation going?

A Yes, sir.

I think this is when I shook my head, because I don't think Mr. Schmadel gave my complete answer to him. I do not disagree with what Mr. Schmadel said up to a point, but it went a little further than that.

I think it would be ideal in the brewing business to have one price to everybody, with the only differential the state tax, and I think I so told that to Mt. [sic] Schmadel. But I don't know of a single brewery east of the Mississippi River—or the Rocky Mountains, I should say—that has that type of pricing policy, and every one of the breweries we were in competition with—we were a small factor in the overall marketplace—had different prices in different states.

* * * *

CROSS EXAMINATION

* * * *

[966] Q (By Mr. Cusack) You testified, Mr. Tate, it was the policy of the Falls City Brewing Company to meet the Strohs and Pabst prices in Indiana; is that correct, sir?

A Not necessarily meet them, but raise the prices when they raised prices in Indiana.

Q Did you try to be competitive with Strohs' prices and Pabst prices, in Indiana, sir?

A Yes, sir.

• • • •

[977] Q (By Mr. Cusack) If you had lowered your price in Indiana to be equal to the Kentucky price, you think you would pick up additional volume; is that right?

A I think there would have been some additional volume at least for a short period of time.

Q And the beer that you sold in Indiana during the time period cost your company the identical amount as the beer that you sold in Kentucky; isn't that right, sir?

A Yes, sir.

Q Would you concede, Mr. Tate, it is very important for a beer distributor selling the popular-price brands to be able to purchase his beer at a competitive price in the relevant geographic market in which he competes?

A Yes.

MR. CUSACK: I have no further questions.

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PLAINTIFF'S TRIAL EXHIBIT 3

DEPARTMENTAL CORRESPONDENCE

DATE Jan 25, 1978

TO Mr Ernie Oates DEPT

FROM Jack Lebus Hess DEPT

SUBJECT Weekly Report

D This past week D, worked with our distributor Mr Ron Utley, in the Henderson, Kentucky market, I am very pleas to report that Dall Utley, were up over 2500 cwt for the year 1977. Some of this increase is due to the higher Price in Soybeans, but I will have to give Ron and his fine sales force a lot of credit for this fine increase. They do an excellent job.

Dobbs, is still the number one seller in Henderson, with Dall Utley, Second and Beulah and Storlie, are about even for third Place

PLAINTIFF'S TRIAL EXHIBIT 11

DEPARTMENTAL CORRESPONDENCE

DATE Aug 16, 1974

TO Mr Coyle Estes DEPT

FROM Jack Schnell DEPT

SUBJECT Weekly Report

1) This week I, worked the Henderson, Kentucky market with our distributor Mr. Ron Utley. I, am very pleased to report that this market for the first seven months of this year is up in full city sales over 2,500 cases. I, realize that some of this increase is due to the higher prices in the Evansville market, but I also think that Mr Utley has done an excellent job in his market. He has a very good relationship with all of his accounts.

2) This week, one of the largest drinkers

DEPARTMENTAL CORRESPONDENCE

DATE Aug 11, 1924

TO Mr Carl Ritter DEPT.

FROM J. H. Schnatter DEPT.

SUBJECT Willys Report.

stores are featuring Dall Lady, Dayton Parker at a special price of $2.35. This is only one of the many specials and displays that Mr Willys has arranged this summer.

Babs, are still number one in this area with Dall City, a strong second and Balmoral and Steele, about even for third.

J. H. Schnatter

PLAINTIFF'S TRIAL EXHIBIT 28 (EXCERPTS)

FALLS CITY BREWING COMPANY
3050 West Broadway - P. O. Box 1091
Louisville, Kentucky 40201

Office of the President

October 29, 1976

Mr. Henry B. King
United States Brewers
Association, Inc.
1750 K Street, N.W.
Washington, D.C. 20006

Dear Henry,

Enclosed you will find a Xerox copy of all the information we have received from Mr. John T. Cusack.

An additional copy of this information has also been sent today to our general counsel, Mr. Shelton R. Weber, and we would hope that you and your staff will work in concert with Mr. Weber, and his address is: Suite 2307 Citizens Plaza Building, Louisville, Kentucky 40202, and his phone number is 502-589-6300. He will be delighted to send you or whoever you designate, any copies of correspondence with Mr. Cusack, and would likewise like to be kept abreast of any involvement by the United States Brewers Association.

With kindest personal regards, I am,

Cordially,

/s/ James F. Tate
JAMES F. TATE

JFT:cw

Enclosures

copy to: Mr. Shelton R. Weber

GARDNER, CARTON & DOUGLAS
One First National Plaza
Chicago, Illinois 60603
Area Code 312 726-2452
Cable - GARCAR
Telex 25-3623

October 27, 1976

Mr. James F. Tate
President
Falls City Brewing Co., Inc.
P. O. Box 1091
Louisville, Kentucky 40201

Re: *Vanco Beverage, Inc. v. Falls City Brewing Co., Inc.*

Dear Mr. Tate:

This is to inform you that I have been retained by Vanco Beverage, Inc., 2400 North Fulton Avenue, Evansville, Indiana, 47710, the Falls City wholesaler for Vanderburgh County, Indiana, to file suit against Falls City Brewing Co., Inc. in connection with the charges set forth in the enclosed draft complaint.

Unless we can amicably resolve this dispute, we will cause the enclosed complaint, or one similar thereto, to be filed in the United States District Court for the Southern District of Indiana, Evansville Division.

In a good faith attempt to resolve this dispute, I suggest that your counsel contact me so that we can discuss this matter.

Very truly yours,

/s/ John T. Cusack
JOHN T. CUSACK

JTC:dmn
Enclosure

PLAINTIFF'S TRIAL EXHIBIT 29

USBA EXECUTIVE COMMITTEE MEETING
HYATT REGENCY-O'HARE HOTEL
CHICAGO, ILLINOIS
TUESDAY, JULY 5, 1977
10:00 A.M.

Pursuant to official notice, a meeting of the USBA Executive Committee was convened in the United "B" Room of the Hyatt Regency-O'Hare Hotel, Chicago, Illinois on Tuesday, July 5, 1977.

Chairman Peter W. Stroh called the meeting to order at 10:00 a.m.

Committee Members present were: Messrs. August A. Busch, III, Russell G. Cleary, William K. Coors, Frank C. DeGuire, Jerold C. Hoffberger, John D. Koch, J. M. Magenau, Jr., John A. Murphy, Eugene B. Peters, Joseph S. Pickett, Jr. (for Joseph S. Pickett, Sr.), L. F. (Rick) Schmidt, Peter W. Stroh, James F. Tate and James B. Tito.

Guests present were: Messrs. John F. Barry, Jr., James M. Clabault, Warren H. Dunn, Dawson L. Farber, Lester M. Freidinger, James R. Holland, Raymond E. Jones, Jr., John P. Leahan, Daniel F. McKeithan, Edward L. Miles, August U. Pabst, John S. Pedace, Frank J. Sellinger, Robert B. Trainer and Lauren S. Williams.

USBA Staff, Special Counsel and Consultants present were: Messrs. Henry B. King, Allan A. Rubin, Morgan W. Guenther, Glenn E. Braswell, Philip C. Katz, Bernard F. Maloy, Edward Segal, George R. Minshew, Gary M. Nateman, Charles J. Hardardt, Chester Gardner, Oscar G. Polla, John Rost, James W. Riddell, H. Thomas Austern, David H. Hickman, Dr. Thomas B. Turner, and Robert S. ————.

Thereafter, James F. Tate asked for USBA assistance in what he conceived to be an industry problem

being litigated by Falls City Brewing Company in Indiana. After discussion, the USBA was authorized to consider possible means for assisting Falls City and to make available to Falls City the services of Special Counsel to assist him in his defense of the litigation.

There being no further business to come before the Committee, Chairman Stroh declared the meeting adjourned at 4:10 p.m.

/s/ James B. Tito
JAMES B. TITO,
Secretary

/s/ Peter W. Stroh
PETER W. STROH,
Chairman

PLAINTIFF'S TRIAL EXHIBIT 30

DEPOSITION OF JAMES F. TATE

[Question number omitted in printing]

[18] Q Okay, thank you.

Q Are you a member of any trade associations?

A Yes, sir.

Q Which ones, sir?

A The United States Brewers Association.

Q Could you tell us what the U.S.B.A. is?

A It is a trade association of brewers that produce about 95 percent of the beer brewed in the United States.

Q Are you a member of the Board of Directors of that association?

A Yes, sir.

Q Is that association headquartered in Washington, D.C.?

A Yes, sir.

* * * *

[25] Q Mr. Tate, is it the policy of Falls City Brewing [26] Company to sell its beer to all its distributors in one State at a uniform price?

A Yes, sir.

* * * *

[31] Q I understand your testimony that the prices for beer sold to distributors in individual States are all the same for those States?

A Yes, sir.

Q Are the prices different in the various States?

A Yes, sir.

Q Could you tell us, sir, whether the prices of Falls [32] City beer products, which include Falls City brand, Drummond Bros. brand, and Billy Beer brand, are higher when sold to Indiana distributors than to Kentucky distributors?

A Yes, sir.

Q Has this been a fact throughout all of the period of time you have been with Falls City Brewing Company?

A Yes, sir.

Q And according to your knowledge and information, has this situation gone on at Falls City prior to your coming with the brewery?

A Yes, sir.

Q All right. Are the prices for the beer that you sell to Illinois distributors, Illinois distributors that come to your brewery here in Louisville, pick up the beer and take it back to Illinois, are those prices lower than the prices of beer that you sell to the Indiana distributors who come to your brewery here in Louisville?

A Yes, sir.

Q Where do Tennessee prices compare as to the prices of your beer sold to Indiana distributors?

A I would guess that it is lower.

[33] Q Is it a fact, sir, that the prices which you sell beer to Indiana distributors are higher than any of your other prices?

A Yes, sir.

Q Has this gone on for all of the time that you have been with the company?

A Yes, sir.

* * * *

[63] MR. CUSACK: Would the Court Reporter please mark as Plaintiff's Tate Deposition Exhibit 16 a document entitled—the first page of which in handwriting states "Counties assigned to Evansville designated market area as published yearly by A. C. Nielsen Company, Market Research Div."

Q This has been produced, as I understand it, by Falls City, Mr. Tate, pursuant to our Document Request No. 16, or in partial compliance of it, and first of all, have you seen this before?

A No, sir.

Q Directing your attention—you know who the A. C. [64] Nielsen Company is?

A Yes, sir.

Q And could you tell us, for the record, what that company does?

A I know them by reputation only, and as I understand it, they do market research, and who listens to what program, and that sort of thing.

Q Right. Could you take a look at the last page, sir, and it has in the upper left hand column, it has "DMA Market" and it has "Evansville", does it not, sir?

A Yes, sir.

Q And it has "total households" of about—not about—195,400 households, is that right, sir?

A Yes, sir.

Q And that includes, what is that, counties in Illinois?

A I would say they are counties in Illinois, counties in Indiana, counties in Kentucky.

Q And for Indiana you have Dubois, Gibson, Perry, Pike, Posey and Vanderburgh?

A Spencer and Warrick.

Q I'm sorry, Spencer and Warrick, and for Kentucky it is Daviess, Hancock, Henderson, Hopkins, McLean, Union and [65] Webster, is that right, sir?

A Yes, sir.

Q And that area is—generally those counties are contiguous in total?

A I would assume they are.

Q Okay, and then the Illinois counties are Edwards, Wabash, Wayne and White, is that right, sir?

A Yes, sir, that is what it says.

Q Now, let me show you, Mr. Tate, our next exhibit which I ask the Court Reporter to mark as Plaintiff's Tate Deposition Exhibit 17.

Plaintiff's Tate Deposition Exhibit 17, a report from the Media Department, Zimmer, McClaskey, Lewis, Inc., and it is prepared for Falls City Brewing Company—it

is kind of sliced off there, subject: "Evansville Market Advertising January 1, 1974 Thru Current Date", and it is dated current date April 28, 1977, and it is a 1, 2, 3, 4, 5, 6 page document, isn't that right, sir?

A Yes, sir.

Q And the Evansville designated market area, as discussed in the first paragraph on the first page, sir, that includes the same counties as set forth in the A. C. [66] Nielsen Exhibit, does it not, sir?

A Yes, sir.

Q It essentially includes the southwestern portion of Kentucky, the extreme southeastern portion of Illinois, and the portion of Kentucky across the river, Ohio River from those counties?

MR. ADLER: I am going to object to the form of the question. It represents the counties that it represents.

Q All right, the counties that I mentioned?

A That I listed.

Q In Plaintiff's Exhibit 16?

A Yes, sir.

Q Within those counties, of course in your own knowledge, are Vanderburgh County, Indiana and Henderson County, Kentucky though, isn't that right?

A They are among those counties.

Q Those counties are within the Evansville designated market area for advertising by Falls City Brewing Company, isn't that right, sir?

A Yes, sir.

* * * *

[86] Q Is it a fact, sir, that the general price level of beer sold by your competitors in Kentucky is higher than the price level that they sell beer in Indiana—excuse me, the other way around. Let me rephrase that.

Is it a fact that your competitors in the brewing industry, that is the brewers you listed that were the leading sellers in Indiana and Kentucky, sell beer at higher prices in Indiana than they do in Kentucky?

A Yes, sir.

Q Has this existed as long as you have been with the Falls City Brewing Company?

A Yes, sir.

Q And is that the reason why you sell your beer at the prices you do sell them in Kentucky?

A Yes, sir.

Q Is that why you sell at the prices that you do in Indiana?

A Yes, sir.

[87] Q Is your answer the same for Illinois?

A Yes, sir.

Q And Tennessee?

A Yes, sir.

Q And other States?

A Yes, sir.

Q Do you know, sir, whether or not any other brewer selling beer in Kentucky sells beer at the same price to its distributors throughout the State?

A Do I know of any other?

Q Yes, sir.

A Yes.

Q Which company is that, sir?

A Just recently Schlitz made an announcement that they had one price throughout the State of Kentucky.

Q But prior to that they had different prices, did they not?

A They did.

Q And as a matter of fact prior to that all other brewers selling in Kentucky had different prices other than Falls City?

A I am not sure of that.

Q Well, do you know of any others, other than Falls City, [88] that had the same price throughout Kentucky prior to this recent Schlitz announcement?

A I don't have any. I am sure that the records would show that there are probably some brewers that have one price throughout the State.

Q Do you know whether Pabst has one price throughout the State?

A They do not.

Q Do you know whether Stroh's has one price throughout the State?

A They do not.

Q Do you know if Anheuser-Busch has one price throughout the State?

A They do not.

Q What about Falstaff?

A I don't know.

Q What about Strohl's [sic]?

A They do not.

Q What about Sterling?

A I don't think they have the same price throughout the State.

Q What about the other Wiedemann brands—excuse me, the other Hieleman [sic] brands?

[89] A Hieleman [sic] brands are different in different sections.

Q But it has been the traditional policy of your company to have the same price to all of its distributors throughout Kentucky?

A Yes, sir.

Q Do you have any cost savings, Mr. Tate, in selling beer to Kentucky distributors over selling beer to Indiana distributors?

A No, sir.

Q The costs are identical, are they not, sir?

A Yes.

Q Is the cost of selling beer in Indiana cheaper than Kentucky because in Indiana you can't put in electric signs?

A No, sir, not necessarily. In other words, you might spend more on other types of advertising. Just because they don't have electric signs has no bearing on it.

Q Sir, in regard to your Tennessee distributors, do you sell beer to your Tennessee distributors at a set price, uniform set price less a local tax?

A My answer to that would be yes, because the tax in Tennessee, State Tax, is paid by us. The Local Tax is paid by the wholesaler.

• • • •

[92] Q All right, sir. Mr. Tate, other than your lawyer and your wife, with whom have you talked about this law suit?

A I guess those others in the company that are involved.

[93] Q Have you discussed this with people outside of your company, sir?

A No.

Q With no one?

A I can't recall of having talked to anybody outside of the company about it.

I have discussed with—that's not—sure, I have discussed it with Henry King at the United States Brewers Association.

Q He is the President of the U.S.B.A.?

A Yes, he is.

[94] Q Have you discussed it with anybody else at the U.S.B.A.?

A The suit was reported to the Board of Directors of the U.S.B.A.

Q Did you make this report, sir?

A Yes, sir.

Q Was this at a meeting of the U.S.B.A.?

A Yes, sir.

Q Can you tell us what you told the Board of the U.S.B.A.?

A No, I couldn't tell you word for word what I said to the Board.

Q Could you tell us in substance, sir?

A That we had this suit against us and I felt this was sort of a landmark case against the brewing industry, in essence.

Q Did you tell this to Mr. August Busch, Jr.?

A Not across the table, no. He was in the room.

Q And was Mr. Murphy of Miller Brewing Company there too?

A Yes, he was.

Q And was Mr. DeGuire of Pabst Brewing Company there?

A Yes, he was.

Q And was Mr. Schmidt of the Olympia Brewing Company there?

[95] A Yes, he was.

Q And was Mr. Stroh of the Stroh Brewing Company there?

A Yes, he was.

Q And Mr. McKeithan of Schlitz, was he there?

A I don't know whether this was prior to the time Jake took over not, so I couldn't answer that.

Q It could have been Peters?

A It could have been Peters.

Q Who was the former—

A President of Schlitz.

Q Or even Mr. Ely [sic Uihlein]?

A I have forgotten when Bob died.

Q I think he died a year ago last September. Oh, yes, the case was filed a year ago December.

A Yes, so it would have been Peters, I think.

Q Did anybody respond to you after you made the statement?

A A couple of people asked me for copies of the suit.

Q The Complaint?

A The Complaint.

Q Do you recall who asked you?

A Yes, Anheuser-Busch and Carling. Maybe it was just National at that particular time. I don't know whether [96] it was before or after it was National.

Q Jerry Hoffberger?

A No, his attorney, Black, isn't it?

Q I don't know.

Did he ask you at the meeting or subsequently?

A He asked me if I would send him a copy at the meeting.

Q Of Anheuser-Busch, it was August Busch that asked you?

A No, his attorney.

Q In-house attorney?

A In-house.

Q Not Tom Carroll?

A No.

Q Newt Heise?

A I don't recall his name. I could get it out of the directory.

Q It was the General Counsel though—

A Of Anheuser-Busch in-house.

Q And you did send them copies?

A Yes, I did.

Q Did anyone else ask for copies of the Complaint?

A No, sir.

Q Did Mr. August Busch say anything to you at the meeting, or to anyone else in the meeting of this case?

[97] A Not that I am aware of.

Q Can you give us a time when you spoke to the Board? Would it be at the national convention of the United States Brewers Association, or a Board Meeting?

A I think it was a Board Meeting in Chicago.

Q This wasn't the last April meeting, was it?

A No, it was a meeting previous to that.

Q Immediately previous to that?

A No, it wasn't the La Costa meeting. It was a meeting in Chicago for some other reason.

Q Can you give us—as I understand it, the last meeting of the U.S.B.A. Board was in April of 1978, last April, in Chicago, and then you spoke about previously that at the national convention last September at La

Costa. Would it have been at a Board Meeting after La Costa?

A I would say before.

Q And it was in Chicago?

A It was in Chicago, as I recall.

Q Can you give us a month?

A No, sir.

Q Well, was it in the summer of 1977?

A I can't answer that question. I don't know. I would [98] have to look it up in my diary to find out when they had a meeting because I can't tell you off hand.

Q The case was filed in 1976 in December. Is it fair to say that the meeting—

A Was held in 1977.

Q Prior to the LaCrescenta [sic] meeting?

A I would say so.

Q Okay. Do you recall anyone responding to the statement that you made at the meeting?

A No.

Q Do you have any recollection whatsoever?

A No.

Q Have you subsequent to that meeting had any discussion with anybody from the U.S.B.A. or a member of the U.S.B.A. in connection with that law suit?

A Only Henry King and Alan Rubin.

Q And Alan Rubin is with U.S.B.A.?

A He is Henry King's assistant or executive vice, or whatever.

Q What were those discussions about, sir?

A They wanted to know the progress, keeping up with the progress that was going on in the case.

Q Did you give them that information?

[99] A Yes.

Q Was this in writing?

A No, sir.

Q Was it orally?

A Yes.

Q By phone or in person?

A By phone.

Q Do you recall how many times you received a call from Mr. King or from Mr. Rubin, or how many times you called them about the progress of the case?

A I would have no idea.

Q Did anyone at the U.S.B.A. give you encouragement in regard to the defense of this law suit?

A Yes, sir.

Q Who did that, sir?

A Mr. King.

Q And what did he say, sir?

A Well, he supplied—oh I wouldn't say supplied, but he had, what's his name, attorney for U.S.B.A.?

Q In-house attorney or law firm?

A Law firm.

Q In Washington?

A Covington & Burlington.

[100] Q Yes.

A Examine the papers.

Q Do you know who from Covington & Burlington examined the papers?

A Tommy Austern.

Q He is the senior partner of Covington & Burlington, is he not, sir?

A I believe he is.

Q Did Mr. Austern talk to you about the case?

A Yes, sir.

Q When did he talk to you, sir?

A I have no idea of the date.

Q Did you retain Mr. Austern to counsel in connection with this law suit?

A No, sir.

Q Was Mr. Austern counseling you in connection with his duties with the U.S.B.A.?

A I would say yes.

Q What did he say to you, sir?

A I couldn't quote what Mr. Austern said to me.

MR. ADLER: Let's pause here a moment.

MR. CUSACK: Want to take a break, Howie?

[101] MR. ADLER: Yes, I want to consult. (Short pause.)

MR. ADLER: Let's go back on the record, and in the conference during the break, I have satisfied myself that there was an attorney-client relationship, and I will instruct Mr. Tate not to answer any questions concerning communications between him and Mr. Austern or other attorneys of Covington & Burlington.

Do you accept that, sir?

A Yes, sir.

Q Does the Falls City Brewing Company, or do you personally, pay any fees to Covington & Burlington?

A No.

Q Or to Mr. Austern?

A No.

Q Is it fair to say, Mr. Tate, that the U.S.B.A. was concerned that if this suit was successful prices of beer in Kentucky would have to be lowered?

A No.

Q Excuse me. Prices of beer in Indiana would have to be lowered?

A No.

[102] Q Other than the advice of Mr. Austern, is the U.S.B.A. in any other way supporting this law suit?

A There is possible help.

Q What kind of possible help, sir?

A I would hope, but it is non-committed, financial.

Q Help pay your legal fees?

A Help us.

Q There have been discussions in regard to that?

A I have requested same.

Q And has it been granted?

A No.

Q Was there at one time an agreement which was later rescinded to help pay your legal fees?

A There was an indication that they would consider it.

Q And who made that indication, sir?

A The Board of Directors of U.S.B.A.

Q Was this at that meeting in 1977?

A Yes, sir.

Q Subsequent to that meeting in 1977 in Chicago of the Board, was there any subsequent meeting of the U.S.B.A. in which this law suit was discussed?

A No, sir.

Q Did you ask at that meeting that the U.S.B.A. support [103] this law suit?

A Yes, sir.

Q And was there a response by Mr. Busch in response to that?

A I don't recall a direct response by Mr. Busch.

Q Do you recall that there was then a discussion at the meeting following your request?

A They would look into it and see if it was possible for the U.S.B.A. to do it.

Q And this matter is still under consideration?

A As I understand it.

Q Has, up to this point, sir, has the U.S.B.A. or any members of the U.S.B.A. in any way absorbed any of your legal costs or other costs in connection with this law suit?

A I think the U.S.B.A. probably has paid the fees as far as Covington & Burlington's examination of the case.

Q Did Covington & Burlington, sir, give you a letter of opinion in connection with this matter?

A Haven't give me a letter of opinion, no.

Q Have you seen it?

A No, sir.

[104] Q Have they given you any oral opinion in connection with this matter?

A Not me directly.

Q Who have they given it to, sir?

A If they have given any opinion at all, it has been

to my attorney.

Q To whom are you referring, sir?

A Mr. Handmaker.

Q Did Mr. Austern suggest that you hire Mr. Adler?

A No, sir.

MR. ADLER: I am going to instruct him not to answer.

Q Do you accept that instruction, sir?

A Yes, sir.

Q Did Mr. King or anyone else at U.S.B.A. suggest that you retain Mr. Adler?

A No, sir.

Q How did you happen to retain Mr. Adler?

A The firm of Handmaker, Weber & Meyer are our general counsels.

Q I understand, sir.

A And we have a Washington law firm on, what's the—

Q Retainer?

[105] A On retainer, and our law firm was in touch with them.

Q With Mr. Adler or Mr. Handmaker?

A Mr. Handmaker, or Mr. Weber was in touch with our retained Washington attorney, and it was from them that we got the suggestion that we retain Mr. Adler because that law firm is representing another brewery and didn't want to have any part of it.

Q And what is the name of that law firm, sir?

A Porter—

Q Arnold & Porter?

A Arnold & Porter.

Q And they represent Miller Brewing Company, do they not?

A Yes, sir.

Q Actually Phillip Morris?

A I know they—I can't—I know they represent Miller Brewing Company. Whether they represent Phillip Morris and all their subsidiaries, I don't know.

Q Why did the U.S.B.A., or did anyone at the U.S.B.A. evidence any interest in supporting this law suit, sir?

A If this law suit were successful, I think we could be liable for up to about 15 million dollars in the [106] State of Indiana, which is more than the net worth of our company. Since we do about three percent of the business in the State of Indiana, I would assume that every other brewery in the United States that does business in the State of Indiana would also be subject to like law suits which could, if you multiply 15 million times 33—3, sir, oh, 33, right.

Q Three, sir—oh, 33, right.

A I don't know what that figures out but it is an astronomical number.

Q And that was the concern of the U.S.B.A.?

A That is the concern of the United States Brewers Association.

Q It is essentially because the prices are higher in Indiana than other States, is that right, sir?

A I would say that prices are higher in Indiana than they are other States.

Q By all brewers?

A It would be my guess.

Q Okay. Was there any dollar amount discussed at the U.S.B.A. in regard to the support of this law suit?

A No, sir.

Q Any range?

[107] A No, sir.

Q Did you discuss any range?

A I have let them know what our attorney fees have been and that the clock is still running.

Q What did you tell them that the fees were, sir?

MR. ADLER: I am going to instruct him not to answer. I don't think that is a proper discovery.

MR. CUSACK: You are not suggesting that attorney-client was breached?

MR. ADLER: I don't think it is proper discovery. I don't think he should answer.

Q You accept that instruction?

A Yes, sir.

Q When is the last time, sir, that you discussed this law suit with anybody with U.S.B.A.?

A Sixty days ago, two months.

Q With whom, sir?

A Henry King.

Q What did you say to Mr. King and what did he say to you?

A He just asked me what our fees had been to this point and how was it coming, was any progress being made, [108] this sort of thing. At that particular point I told him we were sort of dead center, nothing was happening. It was prior to the time that you required this deposition.

Q Did you tell him what the amounts of this fee were by that time?

A By that time.

Q What was the amount, sir?

A I couldn't remember that at all.

Q Give us the range, approximate amount.

A I don't—

MR. ADLER: Again, I am going to instruct him not to answer, the same question.

Q Do you accept that instruction?

A Yes, I do.

Q Okay. Has your company paid any fees to Mr. Adler or his firm up to this date?

A I would say yes, I think we have.

Q Are you certain that you have or is it your best recollection you have?

A To my best recollection we have paid, yes, his first submitted bill.

Q Did you have any further discussions with the General [109] Counsel of Anheuser-Busch in regard to this law suit?

A No, sir.

Q Or with Mr. Busch?
A No, sir.
Q Anybody from Miller?
A No, sir.
Q Anybody from Stroh's?
A No, sir.

MR. CUSACK: I have no further questions of Mr. Tate. Thank you very much.

MR. ADLER: No cross.

FURTHER DEPONENT SAITH NOT.

JAMES F. TATE

PLAINTIFF'S TRIAL EXHIBIT 32 (EXCERPT)

PART I

Criteria Followed in Establishing Standard Metropolitan Statistical Areas

A standard metropolitan statistical area always includes a city (cities) of specified population which constitutes the central city and the county (counties) in which it is located. A standard metropolitan statistical area also includes contiguous counties[1] when the economic and social relationships between the central and contiguous counties meet specified criteria of metropolitan character and integration. A standard metropolitan statistical area may cross State lines. In New England, standard metropolitan statistical areas are composed of cities and towns instead of counties.

A standard metropolitan statistical area is generally designated on the basis of population statistics reported in a census conducted by the Bureau of the Census. An area designated on the basis of a census shall not lose its designation except as provided for in Criterion 5.

A standard metropolitan statistical area is sometimes designated on the basis of population estimates published by the Bureau of the Census which have been accepted for use in the distribution of Federal benefits. An area designated on the basis of such estimates shall lose its designation, if it does not qualify for designation on the basis of population statistics reported in the next succeeding census conducted by the Bureau of the Census.

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[1] A "contiguous" county either adjoins the county or counties containing the largest city in the area, or adjoins an intermediate county integrated with the central county. There is no limit to the number of tiers of outlying metropolitan counties so long as all other criteria are met.

Basic Criteria

1. Each standard metropolitan statistical area must include at least:

(a) One city with 50,000 or more inhabitants, *or*

(b) A city with at least 25,000 inhabitants, which, together with those contiguous places (incorporated or unincorporated[2]) having population densities of at least 1000 persons per square mile, has a combined population of 50,000 and constitutes for general economic and social purposes a single community, provided that the county or counties in which the city and contiguous places are located has a total population of at least 75,000.[3]

2. A contiguous county will be included in a standard metropolitan statistical area if

(a) At least 75.00% of the resident labor force in the county is in the non-agricultural labor force,[4] *and*

(b) At least 30.00% of the employed workers living in the county work in the central county or counties of the area.[5]

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[2] Unincorporated places as identified and defined by the U.S. Bureau of the Census.

[3] In New England, the cities and towns qualifying for inclusion in a standard metropolitan statistical area must have a total population of at least 75,000.

[4] Nonagricultural labor force is defined as those employed in nonagricultural occupations, those experienced unemployed whose last occupation was a nonagricultural occupation, members of the Armed Forces, and new workers.

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[5] In applying criteria 2 and 3, the central county or counties of the area are defined as:

(a) The county or counties which contain the urban part of a central city of the standard metropolitan statistical area.

[Footnote continued on page 123]

3. A contiguous county which does not meet the requirements of criterion 2 will be included in a standard metropolitan statistical area if at least 75.00% of the resident labor force is in the nonagricultural labor force and it meets two of the following additional criteria of metropolitan character and one of the following criteria of integration.[5]

(a) Criteria of metropolitan character.

(1) At least 25.00% of the population is urban.

(2) The county had an increase of at least 15.00% in total population during the period covered by the two most recent Censuses of Population.

(3) The county has a population density of at least 50 persons per square mile.

(b) Criteria of integration.

(1) At least 15.00% of the employed workers living in the county work in the central county or counties of the area, *or*

---

[5] [Continued]

(b) For areas having central cities qualifying on the basis of criterion 1(b), the county or counties containing the urban part of the city of 25,000 and the contiguous places which together with the city constitute the community of 50,000.

(c) In a standard metropolitan statistical area of 250,000 or more, a county containing

(1) A city of at least 50,000 which has a contiguous boundary with a central city (cities) of the standard metropolitan statistical area, *and*

(2) A population which is at least 80.00% urban and has nonagricultural employment of at least 50,000.

A city whose name is included in the title of a standard metropolitan statistical area is a central city.

The "urban part" of a central city means that part of a central city identified as "urban" by the Bureau of the Census.

(2) The number of people working in the county who live in the central county or counties of the area is equal to at least 15.00% of the employed workers living in the county, *or*

(3) The sum of the number of workers commuting to and from the central county or counties is equal to 20.00% of the employed workers living in the county.

Area Titles

4. The following guidelines are used for determining titles for standard metropolitan statistical areas:

(a) The title of the standard metropolitan statistical area always includes the name of the largest city.

(b) There shall be no more than three city names in the title of any standard metropolitan statistical area. The addition of up to two city names may be made in the area title on the basis of the following:

* * * *

2440	EVANSVILLE, IN-KY	284,959
	Indiana portion	248,928
	Gibson County, IN	30,444
	Posey County, IN	21,740
	Vanderburgh County, IN (A)	168,772
	Evansville	138,764
	Warrick County, IN	27,972
	Kentucky portion	36,031
	Henderson County, KY	36,031
	Henderson	22,976

* * * *

PLAINTIFF'S TRIAL EXHIBIT 33

CLIENT HOUSE OF BEVERAGES

PROGRAM :30 announcements

ANNOUNCER John
SALESMAN Story
WRITER Supplied/gb

WIKY

PX 33
WIKY-FM

Copy

START:	December 8, 1976	December 31, 1976	CODE:

Holiday time . . . a great time to visit the tri-state's largest super-market of beer, wine, other party goods. The House of Beverages! Over 5600 square feet make the House of Beverages the largest store of its kind in the tri-state. Three thousand square feet of wines, hundreds of different domestic and imported wines and champagnes. And through January 1st, Budweiser, a 6-pack of 12-ounce cans, $1.31. Also Michelob in the 6 pack. $1.60. For wines, beers and all party goods, visit the House of Beverages, Old Orchard Shopping Center, Highway 41, north of Henderson.

PX-8

PX. EX. 33

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CLIENT WIKY WIKY-FM

PROGRAM

ANNOUNCER
SALESMAN
WRITER Copy

START: COPY:

Have you heard? The House of Beverages is bigger and better than ever? The most complete store of it's kind in the tri-state. More than 5600 square feet of display area! House of Beverages has a most complete stock of party supplies, party goods and bar accessories and glassware. You'll find all popular beers, ales and malt liquors, domestic and imported wines, champagnes row upon row, shelf after shelf. If you have a hard to find favorite, it's probably at the House of Beverages, Highway 41 north of Henderson at the north end of the Big "K" Shopping Center.

PX-8

APPROVED BY:

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CLIENT
PROGRAM
ANNOUNCER
SALESMAN
WRITER

WIKY WIKY-FM

Copy

START: COPY:

The House of Beverages is bigger and better. The most complete store of its kind in the tri-state. More than just a handy place to pick up beers and wines, House of Beverages has a great selection of party supplies and goods, including gourmet foods and cheeses — many of which are featured at 10 per cent off to celebrate the holidays and their newly enlarged and remodeled store. Now's a good time to stock up on gifts of cheer for the season. The complete House of Beverages, Highway 41 north of Henderson in the Big "K" Shopping Center.

PX-8

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CLIENT
PROGRAM
ANNOUNCER
SALESMAN
WRITER

WIKY WIKY-FM

Copy

START: COPY:

V-1: The House of Beverages is the tri-state's largest . . .

V-2: You can't say that!

V-1: Store of its kind?

V-2: Okay.

V-1: More than just a handy place to pick up beers and wines. Right now to celebrate the holidays and the opening of their newly enlarged and remodeled store, you can save 10 per cent . . .

V-2: You can't say that!

V-1: On party supplies and bar accessories. You'll like the selections, the atmosphere, EVERYTHING about the new House of Beverages. Highway 41 North of Henderson in the Big "K" Shopping Center.

V-2: You CAN say that!

PX-8

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PLAINTIFF'S TRIAL EXHIBIT 33A

CLIENT THE HOUSE OF BEVERAGES

PROGRAM :30 announcements

ANNOUNCER Staff
SALESMAN
WRITER Burton/gb

WIKY WIKY-FM

Pl. 33A

Copy

DATE December 16, 1975 CODE

The House of Beverages is the most complete (H.O.B.) store in the tri-state area. They have a tremendous stock and selection of all your favorite beers, wines and (H.O.B.'s.) Popular brands and hard to find labels as well — imagine — wines from 14 countries! Row upon row, shelf after shelf and now 10 per cent savings on bar accessories and glassware. Stock up now at the House of Beverages, Highway 41, north of Henderson at the north end of Big "K" Center.

U. S. DISTRICT COURT
PLF EX. 33A
NO. CV76-170-C
OFFICIAL COURT REPORTER

APPROVED BY

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PLAINTIFF'S TRIAL EXHIBIT 35A

PLAINTIFF'S TRIAL EXHIBIT 36

CLIENT ROBBY'S BARGE

PROGRAM 30-SECOND COMMERCIAL

ANNOUNCER RT

WRITER RCC

WIKY WIKY-FM

Copy

PX 36

DAY MONDAY THRU THURSDAY BEGIN JULY 22, 1974

NO. 1

OPEN WITH BUGLE CALL - 704-B, BUGLE CALLS - CUT AT ESTABLISH WITH ONLY 5 SECONDS THEN CUT:

ANNOUNCER:

They're off and running at Ellis Park! And you'll be a winner for sure...when you stop in at ROBBY'S BARGE before the races for your favorite beverage and a delicious Smorgasbord lunch. The setting is both relaxing and unique...and the service is great! So (SE AGAIN).. get ready for the races with lunch at Robby's Barge. Open at 11 AM daily..on the Old Waterworks Road off Southlane Drive.

Plf. Ex 36

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PX-120

PROGRAM 30-SECOND COMMERCIAL

ANNOUNCER RT

WRITER RCC

Copy

DAY MONDAY THRU THURSDAY BEGIN JULY 29, 1974

OPEN WITH CALLIOPE MUSIC: (Establish then fade)

ANNOUNCER:

Enjoy moonlight over the river..while dining in the old riverboat atmosphere of ROBBY'S BARGE (up music). After the races...it's the finest place in the Tri-State to relax and unwind..with your favorite beverage. You're always ahead at Robby's Barge...select from a winning entree of charcoal broiled steak, golden fried chicken.. or superbly prepared seafood. Racetrack visitors, tourists, traveling salesmen...everyone...visit Robby's Barge for excellent dining..at the Inland Marina on Old Waterworks Road..

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PX-120

PROGRAM 30-SECOND COMMERCIAL
ANNOUNCER RT
WRITER MCC

Copy

DAY MONDAY THRU THURSDAY BEGIN JULY 22, 1971 TIME

No. 1

OPEN WITH BUGLE CALL - 704-B, BUGLE CALLS - CUT A; ESTABLISH WITH ONLY 5 SECONDS THEN CUT:

ANNOUNCER:

They're off and running at Ellis Park! And you'll be a winner for sure...when you stop in at ROBBY'S BARGE before the races for your favorite beverage and a delicious Smorgasbord lunch. The setting is both relaxing and unique...and the service is great! So (SE AGAIN).. get ready for the races with lunch at Robby's Barge. Open at 11 AM daily..on the Old Waterworks Road off Southlane Drive.

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EXHIBIT NO. PX-120

PLAINTIFF'S TRIAL EXHIBIT 57

Aug. 14, 1974

BEER PRICE 'WAR' BUILDING UP AGAIN

By L. D. Seits
Press Staff Reporter

A beer war between Evansville and Henderson that brought six arrests last month appears to be building again, with the question of the legality of disposition of alcoholic beverages confiscated in one of the arrests being raised.

Prosecutor William Brune, who has questioned the intervention of Indiana excise police in the beer price war, said yesterday one of the six men arrested July 27 had said three quarts of gin confiscated in his arrest and dumped by court order was actually bought in Indiana.

The six were arrested on charges of bringing more than the legal limit of one quart of an alcoholic beverage into Indiana from another state.

But the law, state Alcoholic Beverage Commission chairman James Sims has said, is intended to prevent beverages on which Indiana taxes haven't been paid from being brought into the state.

That, preventing the loss of state taxes, is the only reason the excise police have for getting involved, Sims said in the wake of the arrests.

But taxes had been paid on the gin, if it were purchased in Indiana as reported to Brune, and a check with excise police indicates no effort was made to check on whether it was bought in Indiana before it was dumped out at the city landfill along with 17 cases of confiscated beer.

Lt. Ralph Bruner, head of the state excise police office in Evansville, said yesterday alcoholic beverages no longer

carry an Indiana tax stamp and there was "no way to check" on such a claim.

Maj. Ross Pomolese of the Indianapolis headquarters of the excise police said yesterday by telephone, however, that the state to which a beverage was shipped by the distillery could be determined by checking the federal tax stamp. "If we have to, we can trace it," Pomolese said. He said that excise police would do so if the person arrested pleaded innocent in court.

The man from whom the gin was confiscated also had beer in his car which he acknowledged was bought in Kentucky and City Judge John Rawlings, who signed the order for the beer and gin to be dumped, said today he didn't recall the issue of where the gin was bought being raised.

The result is that the gin, worth more than $15, was dumped and there apparently is no longer any way to determine whether it was legally seized or not.

The question of the legality came amid signs that Henderson retailers were getting increased business from Evansville beer drinkers. One retailer on U.S. 41 north of Henderson but south of the Ohio River said beer sales had increased noticeably since the publicity surrounding the arrests, indicating that some Hoosiers had been unaware of the price gap until then.

The disparity in prices amounts to more than $1 a case on some beers.

Major Pomolese said last week the excise police have halted surveillance such as that which brought the six arrests on July 27 until the force receives word from Brune, who has said he is investigating the matter.

-(KEEP YOUR BOTTOM CLEAN)-

BRIDGE BAIT SHOP

HWY. 41 S.-UNDER NEW BRIDGE-

PH. 423-8575

(CARRY OUT BEER) (CHEAPEST IN TRI-STATE)

- BUDWEISER PREM.—24, 12 oz. CANS $5.99 (Tax Incl.)
- BUSCH, BUSCH LITE, MASS, STERLING, STROH'S, FALSTAFF, FOR THE LOW PRICE OF $5.99 for 24, 12 oz. CANS (Tax Inc.)
- FISH FRY FRIDAY EVENINGS—5:30 'TIL ?
- GAS, OIL, & BOATING SUPPLIES
- DRY DOCK STORAGE—12' to 20' (3 RAMPS)
- 24 HOUR SECURITY SERVICE

PL-108

Evansville Press

7-12-74

BRIDGE BOAT CLUB

HWY. 41 S. UNDER NEW BRIDGE

PH: 423-3576

(CARRY OUT BEER) (CHEAPEST IN TRI-STATE)

PABST BLUE RIBBON: 24, 12 oz. CANS $4.65 (Tax Ind.)

PABST: 24, 16 oz. CANS $5.35 (Tax Ind.)

- BUDWEISER PREM.—24, 12 oz. CANS $5.35 (Tax Ind.)
- BUSCH, FALLS CITY, STERLING, STAG'S, FALSTAFF, FOR THE LOW PRICE OF $4.90 FOR 24, 12 oz. CANS (Tax Ind.)
- FISH FRY FRIDAY EVENINGS—5:30 'TIL ?
- GAS, OIL, & BOATING SUPPLIES
- DRY DOCK STORAGE—12' to 20' (3 RAMPS)
- 24 HOUR SECURITY SERVICE

KEEP YOUR BOTTOM CLEAN

MON.-THURS. 8-11
FRI.-SAT.-SUN. 8-12

PX-109

Evansville Press
7-19-74

BRIDGE BOAT CLUB

HWY. 41 S. UNDER NEW BRIDGE

PH: 423-8576

(CARRY OUT BEER) (CHEAPEST IN TRI-STATE)

SCHLITZ PREMIUM 24 12 Oz. Cans $5.35 (Tax Incl.)

FALSTAFF..... 24 12 Oz. Cans $4.65 (Tax Incl.)

PABST BLUE RIBBON..... 24 16 Oz. Cans $5.80 (Tax Incl.)

BUSCH, FALLS CITY, PABST, STERLING, STROHS..... 24 12 Oz. Cans for $4.90 (Tax Incl.)

MILLER'S, HAMMS, BUDWEISER..... 24 12 Oz. Cans $5.60 (Tax Incl.)

• 24 KCUR SECURITY SERVICE

WE DO NOT SELL TO LIQUOR STORES OR TAVERN OWNERS!

MON.-THURS. 8-11
FRI.-SAT. 8-12
Closed SUN.

EVANSVILLE PRESS
August 3, 1974
Page 2

PLAINTIFF'S TRIAL EXHIBIT 87

Period of January 1, 1971 - December 12, 1973

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.362 .310	15.74 15.2	18.68 17.7
24/12 oz cans in 12 pack	.272 .240	8.81 7.8	9.96 9.6
24/12 oz cans in 6 pack	.352 .370	11.07 10.7	12.43 12.3
24/12 oz no return bottles	.327 .360	11.22 11.0	12.63 12.5
24/32 oz no return bottles	.48 .470	13.89 13.4	16.13 15.5
1/2 barrels	1.39 1.40	15.51 15.7	18.36 17.3

Period of December 13, 1973 - July 4, 1974

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.389 .420	23.28 22.6	30.36 29.2
24/12 oz cans in 12 pack	.478 .510	14.35 14.5	17.02
24/12 oz cans in 6 pack	.508 .540	15.23 15.2	17.94
24/12 oz no return bottles	.588 .590	17.51 17.3	21.23
24/32 oz no return bottles	.645 .670	18.70 19.5	23.12
1/2 barrels	2.798	22.30	28.70

U.S. DISTRICT COURT
FILED
DEC 16 1974
DAVID H. COOLEY, CLERK
OFFICIAL COURT REPORTER

PX-123

Period of July 5, 1974 - December 29, 1974

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.618 .620	21.41 - 22.6	27.25 - 29.2
24/12 oz cans in 12 packs	.488 .520	13.38 - 13.5	15.45 - 15.6
24/12 oz cans in 6 packs	.518 .540	14.05 - 15.2	16.35 - 17.9
24/12 oz no return bottles	.566 .580	16.06 - 17.4	19.14 - 20.99
12/32 oz no return bottles	.637 .689	16.75 - 16.7	20.17 - 20.00
1/2 barrels	2.798 3.020	19.23 - 18.6	23.81 - 23.2

Period of December 30, 1974 - January 1, 1976

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.468 .500	16.22 - 16.1	19.35 - 19.2
24/12 oz cans in 12 packs	.488 .520	13.87 - 12.9	14.71 - 14.9
24/12 oz cans in 6 packs	.488 .520	12.82 - 12.9	14.71 - 14.9
24/12 oz no return bottles	.478 .510	13.30 13.4	15.33 - 15.5
12/32 oz no return bottles	.607 .659	15.80 - 15.5	18.35 - 18.3
1/2 barrels	2.798 3.020	19.23 - 17.9	23.81 - 23.2

Period of January 2, 1976 - January 31, 1977

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.268	8.98 - 9.4	9.86 - 10.3
24/12 oz cans in 12 packs	.468	11.98 - 12.1	13.61 - 13.8
24/12 oz cans in 6 packs	.468	11.98 - 12.1	13.61 - 13.8
24/12 oz no return bottles	.478	12.86 - 12.1	14.76 - 13.8
24/16 oz cans in 6 packs	.507	10.75 - 11.0	12.05 - 12.3
24/7 oz no return bottles	.281	10.31 - 10.5	11.50 - 11.8
12/32 oz no return bottles	.507	12.47 - 12.6	14.25 - 14.5
1/2 barrels	2.878	19.02 - 18.7	23.49 - 22.9

Period of February 1, 1977 - April 24, 1977

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Dawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz returnable bottles	.268	8.98 - 9.4	9.87 - 10.3
24/12 oz cans in 12 packs	.468	11.69 - 11.8	13.61 - 13.4
24/12 oz cans in 6 packs	.468	11.69 - 11.8	13.23 - 13.4
24/12 oz no return bottles	.478	12.87 - 12.98	14.27 - 14.4

24/16 oz cans in six packs	.56727 .600	11.45 11.66	12.96 13.2
24/7 oz no return bottles	.381 .400	13.80 13.6	15.60 15.7
12/32 oz no return bottles	.507 .550	12.47 12.4	14.25 14.5
1/2 barrels	2.878 3.100	19.02 18.7	23.49 22.8

Period of April 25, 1977 - November 30, 1978

Package Size	The difference between prices charged by Falls City to Vanco and prices charged by Falls City to Dawson Springs	The percentage by which prices charged by Falls City to Lawson Springs are less than prices charged by Falls City to Vanco	The percentage by which prices charged by Falls City to Vanco are more than prices charged by Falls City to Dawson Springs
24/12 oz no return bottles	.46825 .500	12.37 12.5	14.21 14.3
12/32 oz No Return Bottles	.440	11.0	12.9

Note: Previous price increase for 12/32 No Return Bottles

PLAINTIFF'S TRIAL EXHIBIT 88 (EXCERPTS)

VANCO BEVERAGE, INC.

SEVEN (7) YEAR AVERAGE INCOME TO BE CAPITALIZED ON SALE OF BUSINESS
BY MULTIPLYING BY TEN (10) TO GET EARNINGS RATIO

	1970	1971	1972	1973	1974	1975	1976	1977
1964	33,796							
1965	24,456	24,456						
1966	(4,499)	(4,499)	(4,499)					
1967	2,142	2,142	2,142	2,142				
1968	26,928	26,928	26,928	26,928	26,928			
1969	73,972	73,972	73,972	73,972	73,972	73,972		
1970	52,462	52,462	52,462	52,462	52,462	52,462	52,462	
1971	209,257	(3,392)	(3,392)	(3,392)	(3,392)	(3,392)	(3,392)	(3,392)
1972	+7	172,069	(72,448)	(72,448)	(72,448)	(72,448)	(72,448)	(72,448)
1973	29,894	+7	75,165	(4,681)	(4,681)	(4,681)	(4,681)	(4,681)
1974		24,582	+7	74,983	16,510	16,510	16,510	16,510
1975			10,738	+7	89,351	4,268	4,268	4,268
1976				10,712	+7	66,691	(205,229)	(205,229)
1977					12,764	+7	(212,510)	(62,121)
1978						9,528	+7	(327,103)
							(30,358)	+7
								(46,729)

The seven (7) year average income dropped from $29,894 in 1970, to a negative $46,729 in 1978; a swing of $76,623 per year.

When taking ten (10) times earnings as a factor in valuing a business, Vanco Beverage, Inc., lost $766,000 of value from 1970 through 1977.

YARDS BEVERAGE, INC.

VALUATION OF BUSINESS

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968	1967	1966	1965	1964
Operating Income for Year Ending December 31	25,000	(62,131)	(305,929)	4,960	16,510	(4,581)	(72,448)	(3,992)	52,462	73,972	56,958	9,569	(5,699)	26,656	53,796
Stockholder Equity at December 31		23,594	(228,410)	(23,762)	(22,571)	(19,874)	(13,331)	98,063	289,829	259,967	226,832	208,117	203,067	209,388	179,312
Fair Return on Investment - Percentage*		10%	10%	08%	07%	07%	07%	07%	06%	06%	04%	04%	04%	04%	04%
Dollars		2,359	(22,841)	(1,833)	(1,580)	(1,391)	(933)	6,864	17,388	15,598	13,578	12,367	12,184	12,573	10,769
Goodwill (Negative Goodwill)		(47,700)	(182,388)	6,167	18,026	(3,379)	(71,515)	(3,131)	34,872	58,402	(12,498)	(10,223)	(15,606)	(12,613)	23,044

*Percentage estimated on basis of top percentages being paid by various saving organizations.

	TOTAL	1972	1970
Seven Years' Total Operating Income (Loss)		(327,103)	209,257
Less Seven Years' Total Return on Investment		(17,921)	93,761
BENEFIT TO BUSINESS	(474,772)	(309,182)	115,496

PLAINTIFF'S TRIAL EXHIBIT 95

SOURCE: [illegible]

Pl 95

VANCO'S SALES BY BRAND
1972-1977

	No. of Cases	Percent of Total
1973		
Falls City	338,100	77.3
Anheuser-Busch	99,403	22.7
Heileman Products	--	--
Other		--
Total	437,503	
1972		
Falls City	280,218	56.6
Anheuser-Busch	227,873	43.4
Heileman Products	862	.002
Other	9,177	1.8
Total	413,232	
1974		
Falls City	237,132	47.3
Anheuser-Busch	252,950	50.3
Heileman Products	764	.002
Other	11,536	2.3
Total	502,402	
1975		
Falls City	198,004	44.8
Anheuser-Busch	237,247	53.7
Heileman Products	1,328	.003
Other	5,265	1.2
Total	441,844	
1976		
Falls City	167,477	47.2
Anheuser-Busch	176,309	49.7
Heileman Products	7,038	2.0
Other	3,879	1.1
Total	354,703	
1977		
Falls City	142,732	26.9
Anheuser-Busch	205,955	38.6
Heileman Products	179,989	33.8
Other	3,827	.7
Total	532,493	

Pl Ex. 95
(Image above has been reflected in order to read it.)

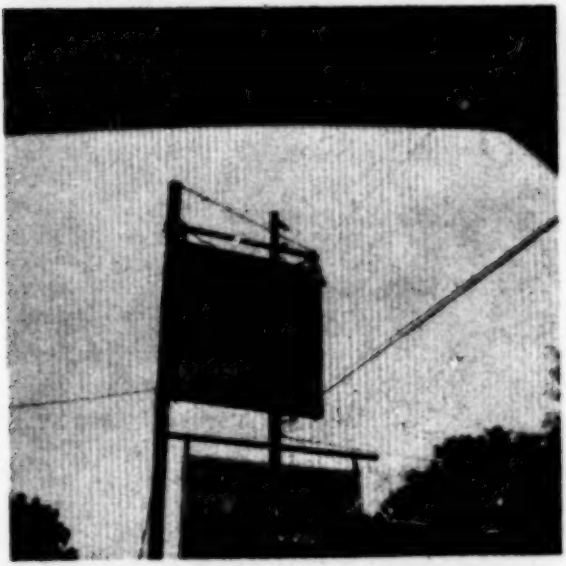
PC-V-A

PLAINTIFF'S TRIAL EXHIBIT 112

PLAINTIFF'S TRIAL EXHIBIT 113

PLAINTIFF'S TRIAL EXHIBIT 115

PLAINTIFF'S TRIAL EXHIBIT 116



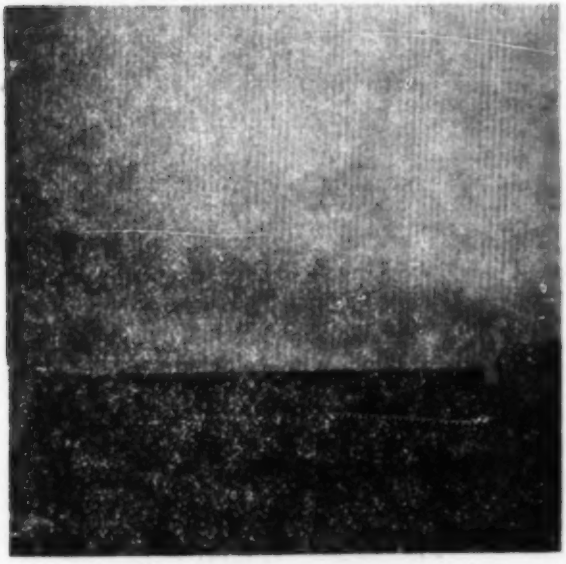
PLAINTIFF'S TRIAL EXHIBIT 118

PLAINTIFF'S TRIAL EXHIBIT 123

PLAINTIFF'S TRIAL EXHIBIT 124

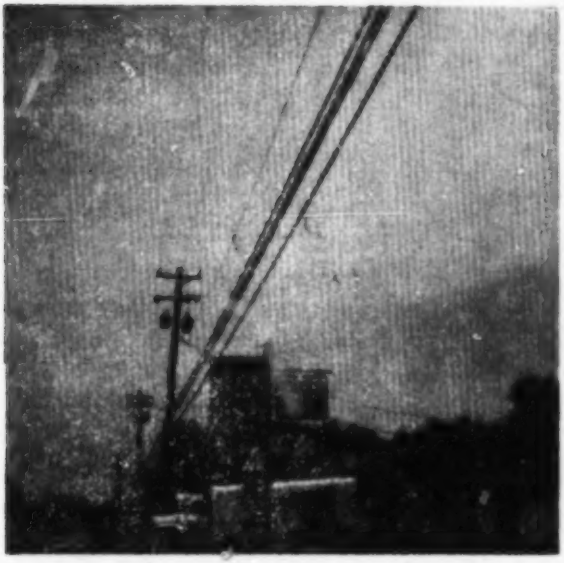
PLAINTIFF'S TRIAL EXHIBIT 126

PLAINTIFF'S TRIAL EXHIBIT 127



PLAINTIFF'S TRIAL EXHIBIT 128

PLAINTIFF'S TRIAL EXHIBIT 131



BRIDGE BOAT CLUB

HWY. 41 S. UNDER NEW BRIDGE

Ph. 422-8576

(CARRY-OUT BEER) (CHEAPEST IN TRI-STATE)

SCHLITZ PREMIUM 24 12 Oz. Cans $5.35 (Tax Incl.)

FALSTAFF..... 24 12 Oz. Cans $4.65 (Tax Incl.)

PABST BLUE RIBBON..... 24 16 Oz. Cans $5.80 (Tax Incl.)

BUSCH, FALLS CITY, PABST, STERLING

STROHS..... 24 12 Oz. Cans for $4.90 (Tax Incl.)

MILLER'S, HAMMS, BUDWEISER..... 24 12 Oz. Cans $5.60 (Tax Incl.)

RIB-EYE NIGHT (SATURDAYS) $3.59

10 OZ. RIB-EYE, BAKED POTATO, SALAD

MON.-THURS. 8-11
FRI.-SAT. 8-12,
Closed SUN.

THE EVANSVILLE COURIER—FRIDAY AUGUST 16, 1974—

BRIDGE BOAT CLUB

HWY. 41 S. UNDER NEW BRIDGE

PH: 423-8576

(CARRY OUT BEER) (CHEAPEST IN TRI-STATE)

SCHLITZ PREMIUM 24 12 Oz. Cans $5.35 (Tax Incl.)

STERLING..... 24 12 Oz. Cans $4.65 (Tax Incl.)

PABST BLUE RIBBON..... 24 16 Oz. Cans $5.80 (Tax Incl.)

BUSCH, FALLS CITY, PABST, FALSTAFF, STROHS..... 24 12 Oz. Cans for $4.90 (Tax Incl.)

MILLER'S, HAMMS, BUDWEISER..... 24 12 Oz. Cans $5.60 (Tax Incl.)

MILLER'S (PONY-PAK) 8, 7 oz. Bottles $1.15

WE DO NOT SELL TO LIQUOR STORES OR TAVERN OWNERS!

MON.-THURS. 8-11
FRI.-SAT. 8-12
Closed SUN.

EVANSVILLE PRESS
AUGUST 10, 1974
Page 3

BRIDGE BOAT CLUB

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RIB-EYE NIGHT (SATURDAYS) $3.59

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MON.-THURS. 8-11
FRI.-SAT. 8-12
Closed SUN.

EVANSVILLE COURIER
AUGUST 17, 1974
Page 2

PLAINTIFF'S TRIAL EXHIBIT 159

DEPARTMENTAL CORRESPONDENCE

DATE January 18, 1974

TO Mr. Emil Peter DEPT.

FROM Tom Mullin DEPT.

SUBJECT Evansville, Indiana January 14-18, 1974

I worked the Evansville, Indiana market along with Mr. Jack Schnatter. Our main purpose was to get more distribution of Drummond Brothers Beer. I worked three days with Vance Beverage Salesman George Hatfield and one day with Jim Fleming, whose chief duty is the stocking and rotation of Supermarket shelves. I found that the retailers were receptive to the fact that we were going to have TV commercials on local stations. We were able to obtain approximately 70% distribution of Drummond Brothers in the major carry-outs. The Distribution of Drummond Brothers in the on-premise accounts is very poor.

From the talk around Vance Beverage it seems that the "Schnadel" bill concerning prices in Indiana and surrounding states is buried in committee in the State Legislature.

It was a little more difficult getting distribution on Drummond Brothers this time because most of the retailers have had it previously. Some told us that they would rather wait until they got some calls. While working with George Hatfield I tried to get distribution in the on-premise accounts in the Evansville University area. Most of these also were going to wait until they got some calls.

Tom Mullin

Tom Mullin

PLAINTIFF'S TRIAL EXHIBIT 160

DEPARTMENTAL CORRESPONDENCE

DATE Feb 15, 1974

To Emile Peter DEPT.

From Jack Schnatter DEPT.

Subject Weekly Report

This week I went in Mt Vernon, Ind one day and the rest of the time I spent in Henderson, Ky. market. I am pleased to report that sales in both of these market are up over last year Mr Elmer Fuller stated that Falls City is picking up in his area, and December and January sales are part of this. Both months showed a nice increase.

Sales in the Henderson, market are also up the last two months. Some of this increase is due to the price increase in the evansville area. but there is also a nice increase in Louisa

DEPARTMENTAL CORRESPONDENCE

DATE Feb 5, 1914

Mr Cecil Peters DEPT.

Jack Schmaltz DEPT.

SUBJECT Weekly Report

County, which would indicate that sales could be on the increase in these two areas. We are also showing a small increase in Drummond Bros, sales for the month of January. This is the first increase in sales that I have noticed since we Drummond T.V. commercials began.

J H Schmaltz

PLAINTIFF'S TRIAL EXHIBIT 163

DEPARTMENTAL CORRESPONDENCE

Sept 22, 1974

TO: Mrs Cyril Peters DEPT

FROM: Jack Schnatter DEPT

SUBJECT: Weekly Report

The St. Simons, market continues to hold up in sales for 1974. However sales were down slightly in July and August Falls City has not lost any of its percentage of the market. The Top brand in the market are Falls City, Pabst and Busch. Pabst sales are down with Busch sales up. Stroh's and Sterling are still far behind.

In the Evansville, market all brands were down in July and August. For the month of July, Pabst were down 1300 cases. Pabst are still number one

DEPARTMENTAL CORRESPONDENCE

DATE Sept 20, 1974

TO Mr. Emil Peters DEPT

FROM Jack Schnatter DEPT

SUBJECT Weekly Report

with Fall City second. Basch and Sterling are very close for third position.

With Vance now having three salesmen, they have an excellent chance to get Fall City, back to where it should be in this market.

I am pleased to report that salesman Bill Clark, and myself were able to acquire two new Longh. accounts

JS Schnatter

PX-45

PLAINTIFF'S TRIAL EXHIBIT 170

BASIC REPORT

(Furnish 2 Annually For A & B Distributors - 1 Annually for C Distributors)

Date Previous Report 1-15-74 Date 8-15-74

Name Vanco Beverage Co., Inc. A 3006

Address 2400 No. Fulton Ave. Phone 425-9019

Town Evansville State Indiana Miles from Louisville 130

State Permit No. IABC 1632 Expires 8-7-75 Basic Permit No. CIN-P-67 How Shipped own transport

Corporation? X Partnership? Sole Owner?

If Corp. List Officers Earl Schmadel, President & Treasurer
Jane Schmadel, V. P.

If Partnership List Them: Name of Sole Owner

J. Bredes Bill Clark

Manager or Man to See Earl Schmadel or Henry LaRue Contact Man G. Halfield

Bookkeeper Ren Hester - Sue Bowman

Route Salesmen John Tregesser, Eugene Crooks, Ted Mueller, Syl Folz, James Linton, James Alvey, Tom Schiff, Kenneth Parton, James Salles, Bob Salat, Ray Bates, Bob Caner, Jr., Jim Fleming, Jim Reeb, Steve Lonnert, Charles Darnell, Robert Salat, Jeff Salat, Don Goodwin, Odis Meredith - Gary Wilhite H. Rebsrock, H. Pittman

Transport drivers Richard Brown, Don Goodwin

How Often Are Outlets Serviced Per Week? 2 plus special del. No. of Routes 5

Number Delivery Trucks 10 reg., 3 special Number Transport Trucks 2 tractors, 3 trailers

Adv. on Delivery Trucks Falls City 7 Adv. on Transports Falls City 3
Budweiser 2 - Busch 1

Brands Carried on Delivery Trucks Falls City, Budweiser, Kingsburg Cereal Bev. assorted imported beers, Busch Rhinelancer

Does Distributor Rotate Stock? yes Any Old Stock? no What? -

SALES PERIOD	PACKAGED FALLS CITY		DRAUGHT FALLS CITY	
Last Month's Sales Dec.	20,574	Cases	142	½ Bbls.
Same Month Last Year	19,731	Cases	362	½ Bbls.
Jan. 1-Thru Last Full Mo.	162,476	Cases	3567	½ Bbls.
Same period Last Year	194,977	Cases	6047	½ Bbls.
1/1/72 - 6/30/72	330,100		3257	
1/1/73 - 12/31/73	279,504		3428	

(3) INVENTORY

24/12 oz. Export Bottles DB 120	1715	Cases	8-2-74	Date
4/6 12 oz. Non-Ret. Bottles	615	Cases	236	Date
12/32 oz. Quart Bottles		Cases		Date
12/32 oz. Non-Returnable Quart Bottles	194	Cases	221	Date
8/6 12 oz. Cans		Cases		Date
4/6 12 oz. Cans DB 121	2121	Cases	226	Date
12/12 oz. Cans	471	Cases	234	Date
½ Bbls. Draught	202	½ Bbls.		Date
1/4 Bbls. Draught	16			
3/8 12-oz. Non-Ret.	871	-		

PERMITS		SELLING	PERMITS		SELLING
15	Super Markets	15		Pool Rooms	
35	Grocery Stores	35		Gas Stations	
4	Hotels	3	3	Bowling Alleys	3
-	Cocktail Bars	-		Confectioneries	
189	Taverns	185	4	Drug Stores	4
6	Restaurants	6	24	Package Stores	24
-	Beer Depots	-			
24	Private Clubs	24	304	Grand Totals	302

FORM 110—PAGE 1

BASIC REPORT

Town Evansville, Indiana

(4) MARKET ANALYSIS

List Leading Beers In Market (1) Pabst (2) Falls City (3) Sterling Beech

If Falls City Not First, What In Your Opinion, Are The Reasons

What Do You Suggest Be Done To Put Us In First Place

Were Suggestions Made To Distributor Yes If So, What Continue the extra effort on displays in off-premise outlets

Are Any Brands Directing Special Effort In This Market No By What Means

List Other Distributors And Brands Handled In Market

Sterling Brewers, Inc., Evansville, Sterling, Cooks

Working Beverage Co., Mr. Working - Stroh's, Schlitz, Old Milwaukee, Wiedemann, Drewrys

Pocket Beverage Co., E. F. Ortmeyer - Pabst, Blatz

Tri-State Bev. Co. - Hugh Beggs - Burger

Zausch Dist. Co., Inc. - ~~Moerter-Brau~~ - Colt 45 . Rainier, Oak
Edward Zausch Augustiner, Fehr's, Sterling.

Counties Allotted	Permits	Selling	Counties Allotted	Permits	Selling	Counties Allotted	Permits	Selling
Vanderburg	304	302						

REMARKS

Town Evansville, Indiana

(4) MARKET ANALYSIS — PRICE STRUCTURE

Brand Name	24/12 EXP.	NON-RET QUARTS	4/6 NR.	RETURNABLE QUARTS	48/12 CAN	12/12 CAN
Regional Brands	4.85	5.85	5.40		5.60	5.60
National Premiums	5.60		5.95		6.10	

Draft Beer Price (Price to Retailer) Standard 23.00 National
1/4 Bbl. 13.25 Michelobe 27.00
Bud. 25.00
Mich 1/4 16.75

(5) DISTRIBUTOR ANALYSIS

Does Distributor Sell Products Other Than Beer No What --
List All Beers Handled By Distributor Falls City, Budweiser, Kingsbury Cereal Be
assorted imported beers Busch, Rhinelander Michelobe

What Is Being Done With Product Displays Displays are good
Approx. Number Last 30 Days — Tavern -- Off-Premise --
How Is Placement Of Point Of Sale Material Good % Distribution 95%
Inventory Of Point Of Sale All current P O S up
If No Inventory What Was Done To Secure An Allocation --
Does Distributor Know Advertising In Market yes
How Does Our Distributor Compare With Competition's excellent
Who, In Your Opinion, Is Best Distributor In Market Vanco Bev. Co. Why Tye have the best organization & best physical facilities
How Does Distributor's Equipment Compare With Competition good
How Does Distributor's Routemen Compare With Competition good
How Does Distributor's Plant Compare With Competition good

(6) GENERAL

Did You Check Poster Locations Yes
Are Locations O.K. Yes
If Not Good, What Action Was Taken With The Posting Company --

Who Is Considered The Leading Beer Advertiser In The Market

What Medias Are Used P O S., posters, spectaculars, radio, newspaper, T.V.
Any Recommendations To Advertising Department

Any Recommendations To Sales Department --

OUTLINE ANY SPECIAL CONDITIONS OR CIRCUMSTANCES WE SHOULD KNOW ABOUT THIS DISTRIBUTOR, HIS TERRITORY OR ABOUT HIS COMPETITION

Rate Distributor A B C or D A
Signed by John H. Schuster Date 8-15-74

FORM 116—PAGE 3

EVANSVILLE, INDIANA

COMPARATIVE SALES FIGURES

	1972	1973	1974	Drum Bros.	Draft
JANUARY	24,250-402	24.167-404	18,399	126	163
FEBRUARY	24,565-363	16,642-213	17,965	148	149
MARCH	29,028-457	25,337-254	19,480	179	146
APRIL	26,876-411	22,779-236	19,252	134	172
MAY	26,821-483	25,426-263	24,147	104	208
JUNE	32.568-617	26,156-275	24.940	169	227
JULY	29,736-563	27,634-322	17,719	119	293
AUGUST	32,393-573	26,786-365	20,574	121	306
SEPTEMBER	26,770-492	19,731-183			
OCTOBER	25,546-442	23,160-211			
NOVEMBER	25,861-406	20,594-173			
DECEMBER	25,686-378	21,092-142			
TOTALS	330,100-4822	279,504-3042	162,476	1100	1664

PLAINTIFF'S TRIAL EXHIBIT 184

DEPARTMENTAL CORRESPONDENCE

DATE Aug 22, 1974

TO: Mr Boyd Peters DEPT.

FROM: Jack Schnatter DEPT.

SUBJECT: Weekly Reports

This past week I worked in the Evansville, Indiana, market with Mr Bill Clark, Sanco Rep Co. Evansville Indiana. Mr Clark, and I, called on the major Super Markets and Larger Tavern accounts this week. We found the carry-out accounts to be in very good shape. Space and shelf positions in most outlets are very good. The Tavern accounts are still our better accounts. We are usually either number one or number two in all of these accounts. Next week we were able to obtain four new draft accounts.

DEPARTMENTAL CORRESPONDENCE

DATE Aug 23, 1974

TO Mr Cecil Peters DEPT.

FROM Jack Schnatter DEPT.

SUBJECT Weekly Sales Report

Sales for the month of July are off over 9000 cases from last years sales. Part of this decrease is due to the lower prices in the Kentucky markets and also several accounts increased their inventories because of J's latest price increase. Mr LaRue also informed me that Pabst sales for the same period were off about 13,000 cases.

Pabst is still number one with Falls City second Sterling third and Busch fourth.

Jack Schnatter

PLAINTIFF'S TRIAL EXHIBIT 194 (EXCERPT)

6-22-70

PRICES IN EFFECT JUNE 22, 1970
THIS PRICE LIST SUPERCEDES THE LIST OF AUGUST 4, 1969

	24/12	N.R. 24/12 6 Pack	N.R. 24/12 8 Pack	12/12 CANS	24/12 CANS	24/12 CANS TRAY 6 Pack	24/16 CANS TRAY 6 Pack	N.R. 12/32 Quarts	RET. 12/32 Quarts	½ Bbls.	¼ Bbls.
INDIANA ***	2.50	3.16	3.16	1.64	—	3.38	—	3.50	2.95	12.90	6.55
KENTUCKY	2.12	2.81	2.81	1.495	2.91	3.01	3.70	3.03	2.67	11.00	5.75

*** Price Increase in Indiana as of June 22, 1970

cc: Messrs. Goetz—Wohl—Hammann—Wahl—Ruhl—Duffin—Peter—Metzler—Salmesmen

PLAINTIFF'S TRIAL EXHIBIT 215

DEPOSITION OF RICHARD L. POWELL

[15] Q. As you go east on Highway 41 to the river into Indiana there are other beer retailers are there not along that highway 41?

A. Yes sir.

Q. It's called the strip isn't it?

A. Yes sir.

Q. Okay how many other beer retailers are there along that road?

A. Uh, ——there are several beer retailers. Uh, there is uh, I would say outlets altogether probably 10 to 15. I don't really know right off hand.

Q. 10 to 15 on 41 going north, going east I should say?

A. Yes. Yes.

Q. Into Indiana? Yes?

A. Yes sir.

Q. And there is a beer depot there isn't there?

A. A beer depot?

Q. Isn't there a place where you can drive in and get beer put in your car?

A. I wouldn't call it a beer depot. There's drive-in liquor stores there yes.

Q. I see. Are there any drive-in liquor stores in Evansville?

A. I don't really know to be honest with you.

Q. But you do have them along the strip don't you?

A. Yes sir.

Q. Okay. And we don't have those where I come from Mr. Powell. How does a drive-in liquor store work? Do you drive-in and they hand it through the window?

[16] A. You drive in and I suppose put your order through the window and they hand it back out the window to you.

* * * *

[18] Q. Right. Right. Okay and he's talking about the, it says here the Tri-State, well let me ask you this.

You don't have any reason to doubt the accuracy of what's stated in there?

A. No sir.

Q. You don't engage in false advertising do you?

A. No sir.

Q. Right. And uh, and it states that the House of Beverages, quote "the tri-state's largest supermarket of beer, wine, and other party goods." That's a correct statement isn't it?

A. It was at the time yes sir.

Q. Right. And the Tri-State that's referred to could you describe that sir based on your own knowledge and experience what area you're including there?

A. It would be the area surrounding Henderson and Evansville and Owensboro.

* * * *

PLAINTIFF'S TRIAL EXHIBIT 216

DEPOSITION OF WALTER FEHN

[18] Q. Out-of-the city of Evansville?
A. Out of the city of Evansville.
Q. Right.
A. See we have Henderson, Newburgh, Mt. Vernon.
Q. Newburgh is a suburb?
A. Right.
Q. Do you consider Mt. Vernon
A. Boonville.
Q. in effect a suburb?
A. Well we'd like to.
Q. But you really do don't you?
A. Oh yes. Yal.
Q. And so also
[19] A. Growing all the time. Both getting closer all the time.
Q. So also Henderson right?
A. We'd like to there too.
Q. But you do consider it?
A. Oh yes. It's part of our trading area again.
Q. Right.

PLAINTIFF'S TRIAL EXHIBIT 218 (EXCERPT)

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Telephone (202) 452-6000
Writer's Direct Dial Number
452-6350

John T. Cusack, Esq.
Gardner, Carton & Douglas
One First National Plaza
Chicago, IL 60603

March 26, 1979

Dear John:

Re: Vanco Beverage, Inc. v. Falls City Brewing Co., S.D. Indiana, Docket No. 76-170-C

In response to your letter of March 21, 1979, this is to inform you that U.S.B.A. has no documents responsive to the order I agreed to at the January 5, 1979, hearing (as embodied in the form of order I submitted to Magistrate Godich on January 12, 1979) in addition to those already furnished to you. Also, enclosed are lists of U.S.B.A.'s membership and indicating the membership of U.S.B.A.'s Board of Directors and officers during the relevant period. Allan A. Rubin, Esq., was General Counsel of U.S.B.A. during the period.

With this information U.S.B.A. has complied with the agreements I reached with you on January 5.

Sincerely yours,

/s/ Charlie
CHARLES E. BUFFON

Enclosures

cc: Magistrate Godich
James W. Bradford, Esq.
Howard Adler, Jr., Esq.

PLAINTIFF'S TRIAL EXHIBIT 219

DEPOSITION OF EMIL PETER, JR.

[11] Q Sir, at one time was the Evansville marketing area the second largest marketing area in the sales of Falls City Beer?

MR. ADLER: I object to the form of the question. What do you mean by the "Evansville marketing area"?

MR. CUSACK: The Vanderburgh County, Indiana area.

A I think it was—I think it was number one at one time.

Q That is right?

A Um-hum (affirmative).

Q Do you recall when that was, sir?

A Oh, it has to be about 18—at least 18 years ago, approximately.

Q So, in other words, you sold more beer in Vanderburgh County, Indiana, than you did even in Jeff County, Kentucky where Louisville is?

A No, I am only talking of distributor sales.

Q So it would be after Louisville but largest distributor area?

A Yes, at that time.

Q Was that through Vanco?

[12] A That was through Vanco Beverage. Well, we have been with Vanco ever since before I got there.

Q Do you know where it ranks now?

A Just as a guess, approximately fourth, somewhere in there.

* * * *

[25] Q This exhibit is entitled "S.O.B. Brewery Platform Prices—Indiana State Taxes Included" and it is, I believe, it is a 15 page document. Can you identify this for us, sir?

A It looks like reports that Fred would make me on occasion and it has his name on it, so, yes, I would identify it.

Q Did you receive this yearly from Mr. Kappesser, sir?

A Not necessarily yearly, but on occasions when we were thinking about our own price structure and wanting to check our price structure, we would have Fred accumulate other prices.

Q Where did he get this information, sir?

A From distributors.

Q Would you take a look at, oh, I guess it is the page with the Busch Bavarian at the top, do you see that one, sir? Are we looking at the same page?

A Yes.

[26] Q Do you see that down there under "Buckhorn" it states, "Checked with Hamms Rep. 9/8/75"?

A Yes, I see that.

Q Does it indicate to you that Mr. Kappesser talked to somebody with Hamms regarding these prices?

A It would seem to infer that.

Q Do you notice on the page beginning with the House of Heileman, it states that, "The prices were checked with a Heileman Brewery representative October 2nd, 1975. These are the announced prices, but Heileman has a policy of cutting prices by 20% to 40% per case for 60 days or more on various packages which are changed usually to another package at the end of the sixty day period." Do you see that?

A I see that.

Q As an indication that Mr. Kappesser spoke to a Heileman Brewery representative on or about October 2nd, 1975, is that right?

A It seems he did, in order to probably check the prices that he had already accumulated.

* * * *

[34] Q Thank you, sir.

Mr. Peter, did you have a conversation with Mr. Working of Working Beverage in Evansville concerning the sales by Working Beverage of Billy Beer?

A No, I can't recall ever having met Working to discuss Billy Beer.

Q Don't recollect any discussion?

A I had a telephone call from him and a letter from him.

Q In regard to the telephone conversation, do you recall [35] your suggesting to Mr. Working that he price the Billy Beer at a premium level?

A I don't recall, but I know when talking with any distributor I emphasize the fact that we couldn't tell them what to sell it at. We would prefer or suggest the possibility that it would be sold as a nationally priced beer.

Q Did you suggest to Mr. Working that he sell the beer at any particular price level?

A I am not positive, but it was not beyond the possibility.

Q Did he do so?

A To the best of my knowledge he did.

Q And later on did he drop the price?

A I was given to understand he did.

Q Has Billy Beer been successful in the Evansville market?

A No.

Q Has it been successful in Henderson?

A I wouldn't call it successful insofar as we are not continuing with increased sales.

Q Are your sales declining in the area?

A They have declined.

[EXHIBIT 8 TO PETER DEPOSITION]

TO: Mr. George H. Goetz

FROM: Barbara Block

SUBJECT: Evansville, Indiana and Owensboro, Kentucky Trips

DATE: May 8, 1972

Following is the report on my market trips to Evansville and Owensboro last week. We are setting up this report in a manner which we feel will be fast and easy to read. If it works out that way, we will follow this format on all subsequent market trip reports.

CITY:	EVANSVILLE, INDIANA
DATE OF TRIP:	WEDNESDAY, MAY 3, 1972
NUMBER OF CALLS MADE:	6
WITH WHOM:	Harold Pitman
LUNCH WITH:	Harold Pitman, Bill Clark and Maxie Dallas.
TYPES OF OUTLETS:	Two taverns, two package liquor stores, two super markets.

COMPETITION

As we all know, Falls City is the strongest factor in the Evansville market. Pabst is No. 2, although this depends on the outlets. One package liquor store visited said that Pabst was No. 1. The amazing thing to me was that in talking to retailers, so little was said about Sterling. In fact, Sterling was never mentioned until I pursued it. Stroh's and Budweiser were also mentioned in my interviews with retailers. The men contacted seemed to feel that Budweiser was ahead of Stroh's.

PRICING

In super markets there are four different categories in beer prices, with two to five cents variations on packages. The best beer package in super markets are found at Great Scott. Next in line is Jerry's, which is a large independent. Then, Kroger and A & P. Kroger and A & P are slipping in the market due to the price competition from Great Scott and Jerry's. As for package liquor stores, there seems to be little variation here. In taverns and cocktail

[EXHIBIT 10 TO PETER DEPOSITION]

DEPARTMENTAL CORRESPONDENCE

DATE June 23, 1974

TO Mr Emil Peter DEPT.

FROM Jack Schaullen DEPT.

SUBJECT Weekly Report

This past week I, worked the Henderson, Ky. market with Salesmen Tom Mullins, Ron Utley and his route salesmen. I am glad to report that this market is in excellent shape. To date this year, sales are up over 1200 cases over last year In Union County, we are still number one. In Henderson County we are a strong second. Pabst are number one with Budweiser, number three. Drummond Bros, Pabst are also showing a small increase.

DEPARTMENTAL CORRESPONDENCE

DATE June 23, 1974

TO: Mrs. Emil Peters DEPT.

FROM: Jack Schnettler DEPT.

SUBJECT: Weekly Reports

Mr Utley, informed Mr Mullen, and myself, that the Government Salesman told him that any price increase that he passed on to the retailer, the they would take 70% of it. The Solid people have also told their distributors the same thing.

J H Schnettler

STATE OF INDIANA

F.O.B. BREWERY PLATFORM PRICES

INDIANA STATE TAX INCLUDED:

24/12oz $.[illegible]
12/32oz .285
1/2 Bbl. 1.473

October 15th, 1975

BRAND & EFFECTIVE DATE of INCREASE		EXPORTS 24/12oz	RETURN. QUARTS 12/32oz	NON-RET QUARTS 12/32oz	CANS DOZEN 12/12oz	CANS 24/12oz 4/6 PAK	MISC.	NON-RET 24/12oz 4/6 PAK	NON-RET 24/12oz 3/8 PAK	1/2 Bbl.	1/4 [illegible]
HOUSE OF HEILEMAN	(The prices were announced prices more on various	checked , but He leman has packages	ith a He leman Br wery Rep esentati e Octobe by 20¢ package	a polic of cutt ng price usually o anothe	changed	cities hich have sent to	a price distribu ors.	2nd, 19 5. Thes o 40¢ pe case fo at the e d of the		are the 60 days sixty da	or perm
	NOTE: Packages are avail able only at thos price ch nges wer represe tative.							quotatio . Information		given by	their
	NOTE: No writte notice of these or in pe son by the brewer										
	F.O.B.										
STERLING BEER	Evansville	3.134	3.685	4.165	1.947	3.974		XXX3.814	XXX3.814	16.223	
STERLING ALE	Evansville							XXX3.814			
STERLING BEER	Newport	3.134				3.974		3.814	3.814		
OLD STYLE	Newport	3.134			1.987	1.974	1.807 NR Doz	3.814		16.223	
OLD STYLE	LA CROSSE	3.414	4.735	4.805	2.087	4.174	4.114 Loose Cans 2.047 NR Doz	4.094		17.473	
SPECIAL EXPORT	Newport					4.554		4.634		19.973	
[illegible]	[illegible]	2.714	3.335	4.035	1.807	3.624	1.607	3.434	3.434	16.223	2.7

DEFENDANT'S TRIAL EXHIBIT 1 (EXCERPT)

FALLS CITY BREWING COMPANY
Louisville 11, Kentucky

July 17, 1973

[SEAL]
Mr. Earl Schmadel
Vanco Beverage, Inc.
2400 N. Fulton Avenue
Evansville, Indiana 47710

Dear Earl:

In reply to the correspondence of your General Manager, Mr. Henry Larue of July 11, 1973, I note that you point out that Falls City's actual sales in your market show a decrease of 32,156 cases (21%) instead of the 53,340 case (29%) decrease in withdrawals during this same period. This is, however, still a decrease of such gravity that we are all concerned with the Evansville, Indiana market particularly because such decrease is happening in one of the major markets in Indiana while our Falls City sales experience for the same period of time in the rest of this State is much better than that.

It is true that our District Manager, as well as the District Managers who participated in concentrated merchandising efforts in Evansville, Indiana this year have reported to us those factors involved in this decrease and that is why we were able to acknowledge them in our correspondence to you of July 9, 1973. In this regard it is worthy of note that in the first six months of 1973 we have provided seventy three manpower days in this market as compared to thirty one days of manpower during the same period in 1972. This is far in excess of the manpower being provided in some larger markets than Evansville, Indiana.

Concerning our "image" we recognized several years ago that Falls City Beer apparently was not attracting the younger consumer group. After much research the decision was made to produce Drummond Bros. Preferred Beer to attract that segment of the market. Numerous markets wherein Drummond Bros. Preferred Beer is being distributed have been highly successful with this brand. In fact, in some of our major markets Drummond Bros. Preferred Beer is responsible for from 6.59% of total sales to 10.21% of total sales, and many of these markets are maintaining Falls City Sales or showing an increase therein. However, regretfully, in the Evansville, Indiana market despite showing the decrease aforementioned in Falls City sales, Drummond Bros. Preferred Beer represents only 1.52% of sales. Assuredly the same advertising philosophy was used in Evansville, Indiana as in other markets and more medium advertising was used than in any other market.

Despite the increased manpower support being provided by us in the Evansville, Indiana market, a significant cause for concern may be drawn from the following facts. After the first six months of business in 1972, the Evansville, Indiana market was only 56 cases behind the top Falls City distributor market. However, after the first six months of business in 1973, the Evansville, Indiana market is some 43,960 cases behind the largest Falls City distributor market and some 39,123 cases behind the second largest Falls City distributor market.

As you have stated, quite naturally we are concerned with the new brand in your distributorship, Busch-Bavarian. According to the State figures you quoted for the month of May, 1973 a decline of 10,000 cases was indicated for Pabst during that month, while Strohs suffered a decline of more than 7,000 cases for that same month. Significantly, the withdrawal figures for Falls City Beer in Evansville, Indiana showed a decrease of 9,702 cases, and according to your actual sales records,

Falls City's actual sales showed a decrease of 9,769 cases for that month.

In regards to your request that we not send Mr. Fred Kappesser into your market, I am sure you are aware of our policy in this matter. We reserve the right to send anyone of our District Managers or Regional Manager into any market wherein we are doing business or contemplate doing business so long as we feel he is qualified and licensed.

According to information that I received this morning, I was given to understand that Mr. Max Dallas is no longer with your distributorship. Knowing that he was assigned to the Falls City division of your distributorship, I certainly trust that some suitable replacement will be secured to fill the gap in Falls City promotional activity at the earliest possible date.

The pledge of your General Manager, Mr. Henry Larue, to be the best distributor we have, was certainly in conflict with the tone and contents of his letter. Should you and your organization be dissatisfied with your association with Falls City Brewing Company, we would do our utmost to oblige you in that matter.

Sincerely,

FALLS CITY BREWING COMPANY

/s/ Emil Peter
EMIL PETER
General Sales Manager

EP:gh

cc: H. Larue

bc: Goetz, Tate, Schnatter, File

All Beer and Beverages Sold on Order-to-Order Basis.
Terms: Cash. No Agencies or Franchises Awarded.

PRICES - EVANSVILLE AND HENDERSON
December 13-14, 1976

SOURCE: Plaintiff's Trial Exhibit #76

BRAND AND PACKAGE	F. O. B. BREWERY		PRICE TO RETAILER		CONSUMER PRICE						
	Indiana	Kentucky	Indiana	Kentucky	House of Beverage	HENDERSON Dick's Piner Foods #2	Bureway #4	A & P	EVANSVILLE Crest Scott	Signal Liq.	
BUDWEISER											
Ret. Pte	3.88	3.48	5.60	5.35	6.20	6.25	--	None	None	6.19	
NR Pte 12oz.	4.32	4.06	5.93	5.30	6.80	6.80	6.80	6.16	6.20	6.48	
NR Qts 12-32oz	4.985	4.73	6.30	6.10	7.80	8.40	--	6.72	6.84	7.92	
7oz. NR 6/8 Pke		6.11	8.00	7.70	9.30	9.30	9.54	None	8.46	8.76	
Cans 12oz. 4/6 Pke	4.49	4.12	6.10	5.50	6.80	6.80	6.80	6.36	6.36	6.60	
Cans 12oz. 12-12	2.25	2.06	3.03	2.75	3.40	3.40	--	3.18	3.17	3.30	
Cans 16oz. 4/6		5.13	7.00	6.70	8.20	8.20	8.36	7.24	7.24	7.96	
NR Pte 3/8 Pke								None	None	None	
MILLERS											
Ret. Pte			3.90	3.35	6.20	6.25		None	None	6.49	
NR Pte 4/6 12oz.	4.32		6.20	5.50	6.80	6.80	6.80	6.52	6.52	6.80	
NR Qts	5.19		6.80								
7oz. 6/8 Pke	6.16			7.70	9.30	9.30	9.54	8.46	8.46	8.76	
Cans 12oz. 4/6 Pke	4.55		6.30	5.50	6.80	6.80	6.76	6.36	6.36	6.92	
Cans 16oz. 4/6 Pke	5.60		7.25	6.70	8.20	8.20	8.36	7.48	7.48	7.96	
Lite Ret. Pte								6.40	None	6.49	
Lite NR Pte			3.95	5.50							
Lite NR 12oz. 4/6	4.68		5.95		6.80	6.80	6.76	6.36	6.36	6.48	
Lite Cans 12oz. 4/6 Pke	4.71		6.10	5.50	6.80	6.80	6.76	6.48	6.36	6.60	
Lite Cans 12oz. 12-12			3.03	2.75							
Lite Cans 16oz. 4/6	5.70		7.25	6.70	8.20	8.20	8.36	7.48	7.48	7.96	
BUSCH											
Ret. Pte	3.39	2.83	4.85	4.35	5.30	5.25	--	5.35	None	5.19	
NR Pte 4/6 12oz.	3.99	3.71	5.40	4.90	5.92	5.96	6.12	None	5.64	5.72	
NR Pte 3/8 12oz.	3.99	3.86	5.40	4.90	5.94	5.97	6.27	5.64	5.64	5.70	
Cans 12oz. 4/6	4.17	3.92	5.60	5.10	6.12	6.16	6.36	5.84	5.84	6.04	
Cans 12oz. 12-12	2.06	1.96	2.80	2.55	3.04	3.08	--	2.92	2.92	3.00	
Cans 16oz. 4/6	3.34	4.73	6.50	5.95	7.36	7.36	7.40	6.76	6.76	7.04	
NR Qts	4.39	4.38	5.85	5.75	7.20	7.20	7.08	6.24	6.24	7.08	

PRICES - EVANSVILLE AND HENDERSON
December 13-14, 1976

BRAND AND PACKAGE	F. O. B. BREWERY		PRICE TO RETAILER		House of Beverages	HENDERSON	CONSUMER PRICE		EVANSVILLE	
	Indiana	Kentucky	Indiana	Kentucky		Dick's Finer Foods #2	Sureway #4	A & P	Great Scott	Signal Liq.
STROHS										
Ref. Pte	3.21		4.85	4.55	5.30	5.25	--	None	None	5.15
NR Pte 4/6	3.86	3.54	5.40	4.90	5.92	5.96	6.12	None	5.64	5.72
NR Pte 3/8		3.54	5.40	4.90	5.94	5.97	6.13	5.64	5.64	5.76
7oz. NR. 6/6Pks	4.48			3.75	6.90	6.90	7.14	None	6.18	7.98
Cans 12oz. 4/6	4.00		3.60	3.10	6.12	6.16	6.36	5.84	5.84	6.04
Cans 12oz. 12-12	2.00		2.80	2.55	3.06	3.08	3.10	None	2.92	3.00
Cans 16oz 4/6	5.22		6.50	5.96	7.36	7.76	7.40	7.00	6.96	7.28
NR Qts.	4.26		5.85	5.75	7.20	7.20	7.08	None	6.24	7.08
FALSTAFF										
NR 3/8	3.74									
Ref. Pte	3.11		4.83					5.64	5.64	5.76
NR Pte 4/6	3.74		5.40	4.50	5.30	5.25	--	None	None	4.65
Cans 12oz. 4/6	3.91		5.40		5.40	5.96	6.12	None	None	5.72
Cans 16oz. 4/6	4.99		6.50		6.12	6.16	6.36	5.84	5.84	6.04
Cans 12oz. 12-12	3.91		2.80		7.36	7.76	7.40	None	None	7.04
NR Qts	4.23		5.85					None	2.87	3.00
STERLING										
Ref. Pte	3.23		4.83	4.55	5.30	5.25	--	None	None	5.19
NR Pte 4/6	3.39		5.40	4.90	5.92	5.96	6.12	None	None	4.92
NR Pte 3/8	3.89		5.40	4.90	5.94	5.97	6.13	5.64	4.86	6.56
Cans 12oz. 4/6	4.09		5.60	5.10	6.12	6.16	6.36	5.84	5.84	5.40
Cans 12oz. 12-12	2.01		2.80	2.55	3.06	3.08	3.10	None	2.52	2.70
16oz. cans 4/6	5.18		6.50	5.95	7.36	7.76	7.40	None	None	7.04
NR Qts.	4.34		5.85	5.75	7.20	7.20	7.08	None	6.24	7.08
MICHELOB										
NR Pte 4/6	4.99		7.15	6.15	7.60	7.60	7.60	7.40	7.44	8.08
Cans 4/6	5.05		7.15	6.15	7.60	7.60	7.60	7.40	7.44	8.08
7oz. NR Pte 6/6 Pk	6.14		7.75	7.70	9.30	9.30	9.54	8.10	8.10	8.52

PRICES - EVANSVILLE AND HENDERSON
December 13-14, 1976

BRAND AND PACKAGE	F. O. B. BREWERY Indiana	F. O. B. BREWERY Kentucky	PRICE TO RETAILER Indiana	PRICE TO RETAILER Kentucky	CONSUMER PRICE House of Beverage	HENDERSON Dick's Finer Foods #2	HENDERSON Sureway #4	EVANSVILLE A & P	EVANSVILLE Great Scott	EVANSVILLE Signal Liq.
BREWRYS										
4/6 cans	3.62		4.10		5.40	5.40	5.40	4.36	4.36	4.52
Rt. Pts	2.78		3.30					4.00	None	3.84
16oz 4/6Pk	3.30		5.00	4.40				None	5.24	
DRUMMOND BROS.										
4/6 cans	4.12	3.62		4.68	5.40	5.40	5.40			
FALLS CITY										
Ret. Pts	3.20	2.90	4.85	4.55	5.30	5.25	--	5.35	None	5.19
HR Pts 4/6	3.93	3.42	5.40	4.90	5.92	5.96	6.12	Hine	5.64	5.72
HR Pts 3/8	3.93	3.42	5.40	4.90	5.94	5.97	6.15	5.64	5.64	5.70
7oz. HR 3/8 Pks	2.83	2.53	3.75	3.50	4.17	4.11	4.29	None	3.99	3.99
Cans 12oz. 4/6	4.12	3.62	5.60	5.10	6.12	6.16	6.36	5.84	5.84	6.04
Cans 12oz. 12-12	2.06	1.81	2.80	2.55	3.06	3.08	3.10	2.92	2.92	3.00
Cans 16oz. 4/6	5.00	4.45	6.30	5.95	7.36	7.76	7.40	6.76	6.76	7.04
HR Qts.	4.33	3.80	5.85	5.75	7.20	7.20	7.08	None	6.24	7.08
BLUE RIBBON										
Ret. Pts	3.23	3.01		4.55	5.30	5.25	--	5.35	None	5.19
HR Pts 4/6	3.89	3.66		4.90	5.92	5.96	6.12	None	5.64	5.72
HR Pts 3/8	3.89			4.90	5.94	5.97	6.15	5.64	5.64	5.70
7oz. HR 4/8	3.66				5.56	5.56	5.72	5.32	4.32	5.32
7oz. Cans		3.54			8.58	8.64	8.70	None	None	7.98
Cans 12oz. 4/6	4.85	3.62		5.10	6.12	6.16	6.36	5.84	5.84	6.04
Cans 12oz. 12-12	2.00			2.55	3.06	3.08	3.10	2.92	2.92	3.00
Cans 16oz. 4/6	5.16	4.68		5.95	7.36	7.76	7.40	7.00	7.00	7.28
HR Qts	4.34	4.01		5.75	7.20	7.20	7.08	6.24	6.24	7.08

PRICES - EVANSVILLE AND HENDERSON
December 13-14, 1976

BRAND AND PACKAGE	F. O. B. BREWERY		PRICE TO RETAILER		CONSUMER PRICE					
	Indiana	Kentucky	Indiana	Kentucky	House of Beverage	HENDERSON Dick's Finer Foods #2	Survey #4	A & P	EVANSVILLE Great Scott	Signal Liq.
BLATZ										
Ret. Pts	3.23				5.30	5.25	--	None	None	5.19
NR Pts 12 Pk				2.25	2.50	2.75	2.75	None	None	2.86
Cans 12oz. 4/6	4.05			4.90	5.72	5.76 ..	-- 6.36	None	None	6.04
SCHLITZ										
Ret. Pts	3.86									
NR Pts 4/6 Pk	4.24							None	None	5.19
7oz. NRS	[illegible]							5.64	5.64	6.48
Cans 12oz. 4[illegible] Pk	5.48							None	None	8.76
Cans 16oz. 4/6 Pk	5.29							6.48	5.64	5.80
Light Cans 4/6 Pk 12oz.								None	7.24	7.96
Light NR 4/6 Pk 12 oz.								6.48	6.36	6.60
								6.32	6.16	6.48

NOTE:
1. Indiana wholesale costs to distributor plus .60 per case on Ret. Pts.
2. Indiana cost to retailer plus .60 per case on Ret. Pts.
3. Indiana cost to consumer plus Indiana sales tax of 4% plus .60 per case on Ret. Pts.
4. Kentucky cost to retailer plus .84 per case on Ret. Pts.
5. Kentucky cost to consumer plus 5% sales tax and .84 per case on Ret. Pts.

DEFENDANT'S TRIAL EXHIBIT 15

ANALYSIS OF FALLS CITY AND DRUMMOND BROS. PREFERRED PRICE DIFFERENTIAL IN INDIANA VERSUS KENTUCKY, 1971-1977

	F.O.B. Price Differential			Withdrawals of Falls City and Drummond Bros. Preferred	
Year	Indiana	Kentucky	Difference	Cases	Decrease From Prior Year
1971				363,811	
Exp. 24/12	2.50	2.12	.38		
NR 24/12	3.16	2.81	.35		
24/12 6-pk tray (cans)	3.38	3.01	.37		
1972				351,498	(12,313)
NO CHANGE					
1973				269,430	(82,068)
NO CHANGE UNTIL:					
12/13/73					
Exp. 24/12	2.74	2.12	.62		
NR 24/12	3.40	2.81	.61		
24/12 6-pk tray (cans)	3.55	3.01	.54		
1974				240,051	(29,379)
NO CHANGE UNTIL:					
7/5/74					
Exp. 24/12	3.10	2.45	.65		
NR 24/12	3.75	3.15	.60		
24/12 6-pk tray (cans)	3.90	3.35	.55		
12/30/74					
Exp. 24/12	3.10	2.60	.50		
NR 24/12	3.81	3.30	.51		
24/12 6-pk tray (cans)	4.62	3.50	.52		
1975				197,162	(42,889)
NO CHANGE					
1976				165,513	(31,649)
1/2/76					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	3.93	3.42	.51		
24/12 6-pk tray (cans)	4.12	3.62	.50		

1977				143,683	(21,830)
NO CHANGE UNTIL:					
2/1/77					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	3.93	3.42	.51		
24/12 6-pk tray (cans)	4.22	3.72	.50		
4/25/77					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	4.00	3.50	.50		
24/12 6-pk tray (cans)	4.22	3.72	.50		

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
5th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor	Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.)	other size containers

	24–12 Bot.	12–32 Bot.	24–12 Cans	12–12 Cans	4–6–12 Cans	4–6–16 Cans	24–12 NRB	4–6–16 NRB	4–6–12 NRB	2–6–12 NRB	24–12 NRB	Barrels	½ Barrels	¼ Barrels	⅙ Barrels				
1	1.65		2.52		2.52				2.49		2.71								
2	1.67		2.41	1.68	2.71				2.42	2.42	2.78								
3	1.96	0.63	2.71	1.36	2.91					2.58	2.71								
4	1.65		2.66	1.33	2.64	3.31				2.17	2.67								
5	2.13				2.90	3.66			2.49	2.47	3.08								
6	1.91				2.74	3.12	.45		2.52		2.77								
7	1.91				2.76	3.25	2.18		2.20		2.77								

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

SIGNATURE _____

Subscribed and sworn to before me this the ——— day of _____, 1972

Notary Public _____ My Commission Expires _____

1 Quality Bev. Inc. - Louisville (Jeff. Nicol + Hardin)
2 Caribbean Corp. Maysville (Lewis, Mason + Bracken)
3 Chas Seignious. Dist Gov. Covington (Boone, Campbell + Kenton)
4. United of Lexington, Inc Lexington (Fayette, [illegible], Woodford, Clark, Montgomery, Harrison, Scott, + Bourbon)
5 Medley Dist C. Inc - Paducah (Fulton + Ballard)
6. Lower Dist Co. Bowling Green (city limits only)
7. Bickett Dist Co Owensboro (Daviess + Hancock)

Miller Brew. Co
Acct no. 5182-51
Milwaukee, Wisc

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

re Pabst G Brew
Acct No

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24-12 Bot.	12 oz	24-12 Cans	12 oz Cans	4-12 Cans	4-16 Cans	24-12 NR	2.10 oz NR	4-12 NR	6-8-7 oz NR	12-32 NR	Barrels	Barrels ½	Barrels ¼	Barrels ⅛	other size containers	
1	5.65[illegible]	3.69[illegible]	5.36[illegible]	5.30[illegible]	5.36[illegible]	4.31[illegible]	5.41[illegible]	5.23[illegible]	5.36[illegible]	4.43	5.63		12.61	7.31[illegible]		8.98[illegible]	4.97[illegible]
2	8.5[illegible]	"	"	"	"	"	"	"	"	"	"		"	"		"	"
3	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
4	"	"	"	"		"	"	"	"	"	"		"	"		—	"
5	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
6	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
7	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
8	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
9	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
10	"	"	"	"	"	"	"	"	"	"	"		"	"		"	"
8 oz 12 Bot. Half Keg					8.37	9.07					5.94						

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 197[illegible]

Notary Public My Commission Expires

All prices FOB 10 mile area. Price includes State tax.
Any charges (if) ceramicity FOB given listed above are
[illegible]

SIGNATURE ———————

1. U.S Steel, Inc	Oscaloosa		Davies
2. Bowling Green Bus Co, Inc	Bowling Green		City BG
3. Mannis Distributing	Dayton –		Perry, (City & Cumberland)
4. Pennsylvania Bus Co, Inc	Hopkinsville		Christian
5. Mississippi Dist Co, Inc	Lexington		Adkins Boyd, Clark, Estill, Fayette, Grant, Franklin, Harrison, Jessamine, Mercer, Montgomery, Nicholas, Owsley, Scott, Woodford, Mason, Bracken, Lewis, Henry, Shelby.
6. Mannis Sales Co	Henderson		Henderson, Union
7. Divine Bros Dist, Inc	Louisville		Jeff- + Nerby, Ft Knox
8. M. Lewis Distr Co. Inc	Newport		Kenton, Campbell, Boone, Carroll, Gallatin
9. C. Pabst Dist Co.	Cincinnati		Bullitt, McCracken, Marshall, Graves, Calloway, Carlisle, Hickman, Fulton
10. Hoffmann Dist Co	Bowling Green		Nelson, Bullitt? + Warren

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

Dept.

roth

Stroh Brewing Company
909 East Elizabeth St
Detroit, Michigan 48226

I/W D. R. Van Hoose
Supt. Trans

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

12-19-72

Name and address of distributor	Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Bot.	12—32 Bot.	24—12 Cans	12—12 Cans	4—6—12 Cans	4—6—16 Cans	24—12 NR	4—6—16 NR	4—6—16 NR	3—8—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅙ Barrels	other size containers				
1	112	264	287	317	287	363	258	332	258	258	307	-	1100	600						
2	"	"	"	"	"	"	"	"	"	"	"		"	"						
3	"	"	"	"	"	"	"	"	"	"	"		"	"						
4	Same	→																		
5	"																			
6	"																			
7	"																			
8	"																			
9	"																			
10	"																			
11	"																			
12	"																			
13	"																			
14	"																			
15	"																			
16	"																			
17	"																			

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————————, 197[illegible]

Notary Pub. My Commission Expires

SIGN ———————————

Title ———————————

192

1.	[illegible]	Lancaster	Mrs Mason + Barrett -
2.	Bowling Beer Dist Co	Bowling Green	Ohio Co
3.	D B Smith Dist Co	Carrollton	Carroll, Henry + Shelby
4.	Jos Seitz Dist.	Cynthiana	Harrison
5.	S + B Whole Beer Dist	Frankfort, Ky	Franklin
6	Combs Beer Dist	Hazard	Perry + Harlan
7	Maxim Sales Co	Henderson	Henderson + Union
8	Ky. Acc Beer Dist., Inc	Hopkinsville	Christian - Ft. Campbell (Ky side only)
9	C + K Dist. Co	Lexington	Fayette, Jessamine, Woodford,
10	White Beer Dist, Inc	Louisville	Oldham, Bourbon, Jeff. Meade. Ft Knox
11.	Parker Beverage Co	Maysville	Mason + Bracken
12.	M. Lieb Dist Co, Inc	Newport	Gallatin, Boone, Kenton + Campbell
13.	U.S. Steel Inc	Owensboro	Daviess
14	Sterling Dist. Co	Ashland	McCreary + Fulton
15.	Barrett + Company	Richmond	
16	Manion Dist Co	Owensburg	Morgan City of Richmond
17	Clark Co. Dist. Co	Winchester	Lewis
			Clark + Montgomery

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

12.19.72

Name and address of distributor	Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.)	other size containers

	24—12 Bot.	12—12 Bot.	24—12 Cans	12—12 Cans	6—12 Cans	3—12 Cans	24—12 NR	6—12 NR	4—12 NR	3—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	24/7 NR.			
1	2.07	2.69	2.94	1.97	2.87	3.69	2.63	—	2.63	2.63	2.89		10.00 "	5.00 "		2.19 "			
2	1.95	2.55	2.90	1.85	2.75	3.55	2.45	—	2.45	2.45	2.87		10.00 "	5.00 "		1.85 "			
3	1.90	2.50	2.80	1.90	2.80	3.60	2.50	—	2.50	2.50	2.90		12.00 "	5.00 "		1.90 "			
4	1.93	2.46	2.85	1.93	2.85	3.55	2.55	—	2.55	2.55	2.85		12.00 "	6.00 "		1.98 "			
5	1.85	2.40	2.70	1.90	2.80	3.60	2.49	—	2.49	2.49	2.75		12.00 "	6.00 "		1.87 "			
6	2.40	2.45	2.96	1.98	3.00	3.70	2.70	—	2.70	2.70	2.96		11.25 "	5.75 "		2.00			
7	1.90	2.50	2.85	1.93	2.85	3.55	2.55	—	2.55	2.55	2.85		12.00 "	6.00 "		1.95			
8 ✓	1.99	2.68	2.89	1.94	2.94	3.75	2.70	—	2.70	2.70	2.10		8.00 "	5.50 "		1.99			
9	1.85	2.45	2.75	1.38	2.75V	3.50	2.50	—	2.50	2.50	2.75		8.00 "	4.00 "		1.90			
10	1.91	2.63	2.88	1.94	2.94V	3.75	2.70	—	2.70	2.70	3.10		9.50 "	4.50 "		4.03			
11	2.20	2.62	2.93	1.45	2.90	3.45	2.67	—	2.67	2.67	2.85		9.25 "	4.88 "		2.00			
12	1.85	2.50	2.80	1.90	2.80	3.55	2.55	—	2.55	2.55	2.75		9.25 "	4.88 "		1.85			
13	2.06	2.65	2.93	1.45	2.90	3.70	2.65	—	2.65	2.65	2.95		12.00 "	5.00 "		2.06			
14 ✓	1.85	2.50	2.75	1.38	2.70	3.35	2.49	—	2.49	2.49	2.75		12.00 "	6.00 "		1.85			
15	1.90	2.56	2.85	1.91	2.85	3.58	2.52	—	2.52	2.52	2.80		10.23 "	5.12 "		1.90			

* plus 70¢ Deposit

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———, 1972

Notary by ——— My Commission Expires ———

Title ———

194

1.	[illegible] Dist Co.	[illegible]	[illegible]
2.	Lower Dist Co.	Bowling Green	Warren
3.	Ashw Dist Co.	Carrollton	Gallatin, Carroll
	Ashw Dist Co	Frankfort	Franklin, Henry, Shelby
5.	Lindon Dist Co	Hazard	Perry
6.	Am Dist Co	Harlan	Harlan, Union
7.	Ford Ben Dist	Hopkinsville	Christian
8.	B & N Dist Co	Lebanon	Nelson, Bullitt, Marion
9.	Champion Dist Co	Lexington	Anderson, Clark, Fayette, Montgomery
10.	Dixie Ben Dist	Louisville	Bourbon, Jessamine, Woodford, Jefferson, Harlin, Meade
11.	Chas. A. Arnold Dist Co, Inc.	Maysville	Bracken, Harrison, Lewis, Mason
12.	U.S. Steele	Owensboro	Daviess
13.	Chief Pocahontas Dist Co	Pikeville	McCreary, Pike
14.	Richmond Bottling Works	Richmond	Madison
15.	Wallins Dist Co.	Wallins Creek	Harlan

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

(All Schedules made out in ink by hand)

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24–12 Ret.	12–32 Ret.	24–12 Case	12–32 Case	6–12 Case	4–6–16 Case	24–12 NR	4–6–16 NR	4–6–12 NR	1–6–12 NR	12–32 NR	Barrels	½ Barrels	¼ Barrels	other size containers				
1	2.35/2.45			3.18	3.11					2.78	3.05	22.00	11.00	5.90	3.00				
2	2.35/2.45			3.18	3.11					2.78	3.05	22.00	11.00	5.50	2.86				
3	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
4	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
5	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
6	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
7	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
8	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
9	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
10	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
11	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
12	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
13	2.45/2.55			3.18	3.15					2.92	3.05		11.30	5.65	3.10				
14	2.35/2.45			3.35	3.26					3.04	3.20		11.80	5.90	3.18				

Also has: Sir Edward (12 oz. - 7.25 - 7.25)
Top Hat (5 Gal)
Schenley Kentucky Old (12 oz. - Loose 24/12 pk.)

Subscribed and sworn to before me this the ——— day of ———, 1972

Notary Public My Commission Expires

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

SIGNATURE

Title

196

1. [illegible] Dist Co. [illegible] [illegible]
2. Owens Dist Co — Newport — Campbell, Kenton, Boone
3. United Ice & Coal Co, Inc — Lexington — Fayette, Bourbon, Anderson, Clark, Harrison, Woodford, Jessamine, Montgomery
4. Central Dist Co — Frankfort — Franklin, Shelby, Henry
5. JO Dist, Inc — Bowling Green — Warren
6. Reneo's Dist — Richmond, Ky. — Madison
7. Caribbean Corp. — Maysville — Mason, Bracken
8. Smith Bros Dist Co. — Bardstown — Nelson, Bullitt, Marion (– Raywick, Lanette, St Mary's)
9. S.H. Linton Dist Co — Hazard — Perry
10. Owens Dist Co — Hopkinsville — Christian, McCracken
11. Quality Beverage Co — Owensboro — Daviess
12. Wm "Sonny" Burton — Henderson — Henderson, Union
13. Bardstown Dist Co. — Bardstown — Nelson. (Marion { Raywick, Lanette, St Mary's only)
14. King Bev, Inc — Louisville — Jeff– + Ft Knox

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor	Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.	other size containers

	24—12 Bot.	12—32 Bot.	24—12 Cans 12 Fl. Oz.	12—16 Cans	6—12 Cans	6—16 Cans	24—12 NR	6—16 NR	6—12 NR	6—32 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅙ Barrels				
1	2.25	2.90	3.25		3.25	3.75				2.33	2.93	3.29		11.89	6.50				
2	2.25	2.90	3.00		3.00	3.75				2.73	2.73	3.29		11.89	6.50				
3	2.25	2.80	3.00		3.00	3.75				2.73	2.73	3.29		11.89	6.50				
4	2.25	2.99	3.04		3.25	3.89				2.84	2.82	3.03	21.36	11.25	6.88				
5	2.25	2.80	3.00		3.00	3.75				2.73	2.73	3.09		11.89	6.50				
6	2.25	2.90	3.00		3.00	3.75				2.73	2.73	3.09		11.89	6.50				
7	2.25	2.80	3.00		3.00	3.75				2.73	2.73	3.09		11.89	6.50				
8	2.25	2.80	3.00		3.00	3.75				2.73	2.73	3.09		11.89	6.50				
Tot Bus (only)			2.65		2.65					2.73									
Competitive only 4q	2.35		2.65		2.65					2.82									
					2.75									11.89					

Bringin Bros
Bringin Bros

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete return.

Subscribed and sworn to before me this the ——— day of ———————, 1978

Notary Public My Commission Expires

SIGNA E———————

Title ———————

198

Mr. Lee 13-12-

J.B Dist Co. B. G. Ky. within Burgh that city now Cape
Clear Dist & Wexford
If new axis applied, they will solicit a vote

N Frank Hawkins
Wexford Sole Rep

1. A-R Dist Co. Harlem. (Hobart, Davis, Union)
2. A new Dist Co Carrollton. (Carroll, Gallatin, Boone (Western part - new city))
3. Chas Arnold Dist Co - Maysville (Mason, Lewis, Bracken, Newport, Montgomery)
4. Stanley Stanley Dist Co. Covington (Kenton, Campbell, Boone (Eastern part)
5. A new Dist Co Frankfort (Franklin, Henry, Shelby, Oldham, Fayette)
6. Central Dist Co. Hopkinsville (Christian + McCracken)
7. Richmond Rolling Co Richmond (Madison)
8. J.B Dist Co. Bowling Green. (Warren)

(Sara Clay how Co- only reputed F)

Heaton's Theodore Hamm Co.
720 Payne Ave.
St Paul, Minn 55165

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

I/V M.K. Magenson
mc mgr

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

Right Time other size containers

	24-12 Bot.	12-32 Bot.	24-12 Cans	12-12 Cans	4-6-12 Cans Nit Dog	4-6-12 Cans Pic. Pk.	24-12 NR	4-6-12 NR	4-6-12 NR	24-12 NR	12-32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	Half/16 Cans	Bud Tropical 2/12 6 O.Z.	Lites 36.7 Oz.	
A					5.350	4.060			7.00/5.60							6.460			
B					5.050	3.740			7.00/5.60							6.000			
C		3.38			3.03	3.14			7.00/5.60		3.91		(2.05 6.00)				4.60		
D	-																4.60		
E					5.25	3.72			7.00/5.60		3.82		(1.87 6.00)				4.60		
F		2.59		2.05	3.15	3.80			7.00/5.60		3.80		(2.50 6.00)			6.80	4.60		
G	-																4.60		
H		2.386		3.092	5.092	3.919	5.082		9.00/7.20		3.416		11.736 (6.00)	6.396 (3.00)		Bud/Lt 6.460	4.60	2.218	Bud Lt

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 1973

Notary Public My Commission Expires

SIGN ——————————

Title ——————————

200

1. AeM Dist Co - Hen...son (Wash, Ullin)
2. Whitson Bus Co Owensboro Daviess
3. Ky. Acc Bee Dist, Inc - Hopkinsville Christian + acty H Campbell & Ky Smoke
4. Jack Swagman Dist Co Bellevue Campbell, Gallatin
5. Snell Dist Co Bowling Green Warren
6. Acc Bee Dist Co. Inc Lexington Fayette, Bourbon, Woodford, Jessamine, Anderson, Clark, Montgomery, Madison Co.
7. John Medlin Dist Co Louisville Jeff - Metro Co + H Kng
8. Megan Dist Co Portland McCracken, Fulton

Cost of Product

National Brewing Co
3338 Newburt Ave
Balt. Md 21215

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capitol Plaza
Frankfort, 40601

Cy Connell A. Bodie
Ronald Connell

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor	Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24 Bot. 7-12 oz.	12 Bot. 12-12 oz.	24 Cans 12-12 oz.	Cans 12-12 oz.	Cans 12-16 oz.	Cans 24-12 oz.	24-12 oz.	12-12 oz.	24-12 oz.	12-12 oz.	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers				
1	2.38			2.19	2.95	3.67			2.93		2.58								
2				3.20	3.20	3.97			3.15		3.72				2.38				
3				3.08	3.08	3.77			3.03		3.57				2.61				
4				3.22	3.22	4.025			4.025		3.775				2.51				
5	2.43			2.97	2.97	3.90			2.64		3.56				2.52				
6				2.97	2.97	3.90			3.04		2.55				2.51				
7				3.09	3.09	3.79			3.02		3.54				2.52				
8				2.90	2.90	3.55			2.93		3.58				2.41				
9				3.00	3.00	3.89			3.07		3.60				2.57				
10	2.47			3.05	3.05	3.75			3.02		3.59				2.51				
11				2.58	2.58	3.58			2.92		3.56				2.42				

Does not include Sales Tax

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ——— ———, 1972

Notary Public My Commission Expires

SIGNAT ———

Title ———

202

1. Richmond Pathwork,	Berea	Madison
2. Sterling Dist Co	Berea	McCreary
3. Big Kett Dist Co	Owensboro	Daviess
4. John Martin Dist, Inc	Louisville	Jeff, Meade, Hardin
5. Ale Bev Dist Co, Inc	Lexington	Fayette, Boone, Woodford, Jessamine
6. B & R Dist Co	Lebanon	Marion, Nelson, Bullitt
7 Ky Ale Bev Dist, Inc	Hopkinsville	Christian
8 Combs Bev Dist Co.	Hazard	Perry, Harlan
9. Chas Seligman Dist Co	Covington	Kenton, Campbell, Boone
10 La Fontaine Dist Co	Frankfort	Anderson, Henry, Shelby, Franklin
11. Nelson Royal Crown Bottling Co	Bowling Green	City of B.G. only

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

BREWER'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS FOR EACH DISTRIBUTOR

Name and address of brewery:	Name of distributor
G Heileman Brew. Co.	Newport - Ky Retail Sales
Trading area description for above distributor: (If you have more than one distributor in a city or county, please furnish this office with a map showing the area)	

MALT BEVERAGES SOLD OR SHIPPED INTO KENTUCKY

Size of Container	Brand: Wiedemann — Price	Brand: Blatz — Price	Brand: Old Style — Price	Brand: Old Style — Price	Brand: Burgermeister — Price
24—12 Ret.	3.25	3.25	2.90	3.60	2.85
12—32 Ret.	3.90	3.90	3.60		
24— ans	3.90				
12—12 Cans	1.90	1.90			
6—6—12 Cans	3.90	3.90	3.60	3.95	
6—6—16 Cans	4.75				
24—12 NR					
6—6—16 NR					
6—6—12 NR					
3—8—12 NR	3.40	3.40			3.20
12—32 NR	4.25	4.25			
Barrels	28.00				
½ Barrels	14.00	14.00		15.00	
¼ Barrels	7.50	7.50			
⅛ Barrels					
Other containers					
4/1 - 12oz.RB		3.59			
12/12oz NR					1.56

AFFIDAVIT

I, the undersigned, a principal officer of the above named brewery, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this _____ day of _____,

Dept.

J. Bliss G. Heileman Brew. Co.

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

other size containers

	24-12 Ret.	12-32 Ret.	24-12 Case	12-32 Case	4-6-12 Case	4-6-16 Case	24-12 NR	4-6-16 NR	4-6-12 NR	4-6-12 NR	12-32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	½ Barrels				
1	1.35/1.05	2.50/2.50		1.32	2.68/2.74	3.87/3.96			2.43/2.35	1.85			10.00/9.25	5.00/5.00						
2	1.35/2.05	2.65/2.65		1.65	2.68/2.82	3.87/3.87			2.45/2.50	1.85			11.00/10.00	5.00/5.00						
3	1.34	2.34			2.68	3.87			2.45											
4	1.85	2.58		1.35	2.74	3.86			2.55	2.45			9.25	5.00						
5	1.85	2.58		1.47	2.77	3.98			2.60	2.45			10.00	5.00						
6	2.05	2.85		1.47	2.77	3.98			2.60	2.45			11.00	5.00						
7	2.05	2.85			2.82	3.98			2.60				10.00'	5.00						
8	2.05	2.85		1.47	2.74	3.86			2.60	2.60			11.00	5.00						
9	2.05	2.85			2.68	3.87			2.42				10.00	5.00						
10	1.34	2.34		1.35	2.68/2.74	3.87/3.86			2.45/2.55	1.85			9.25	5.00						
11	1.85	2.58		1.50	2.74	3.86			2.55	2.55			9.50	5.00						
12	1.85	2.65		1.33	2.74	3.86			2.55	2.55			10.00	5.00						
13	2.05	2.85		1.47	2.69	3.59			2.65	2.65			10.00	5.00						
14	1.34	2.34			2.68	3.87			2.42				10.00	5.00						
15	1.34	2.34			2.68	3.87			2.42				10.00	5.00						

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

SIGNAT _____

Title _____

Subscribed and sworn to before me this the _____ day of _____, 1972

Notary Public My Commission Expires

1.	Ky Lex Bar Dist Co	Lexington	Fayette, Jessamine, Bourbon, Scott	
2.	Jos Cochran Dist Co. Inc	Elsmere	Campbell, Boone, part Kenton	
3.	Clark Co Dist Co	Winchester	Clark, Montgomery	
4.	Combs Bar Dist Inc	Hazard	Perry, Harlan?	
5.	Jos Fritz Distr	Cynthiana	Harrison	
6.	Henderson Dist Co	Maysville	Mason, Bracken, Lewis	
7.	A & R Distr Co	Harlan	Harlan, Clay	
8	A & M Dist Co	Harlan	Harlan, Clay.	← Dist + equity Atty only.
9	Ky Ala Bar Dist Inc	Hopkinsville	H. Campbell Co. Ky)	
10	La Fontaine Distr	Frankfort	Franklin, Henry, Shelby, Anderson	
11.	Lane Dist Co	Bowling Green	Warren	
12.	Madison Dist Co	Richmond	Madison + Estill	
13	Fidelity Bar Inc	Owensboro	Daviess	
14	N. Ky Dist Co Inc	Newport	part of Boone, part of Campbell, part of Kenton	
15	Baden Bar Co	Maysville	Mason, Bracken, Lewis	Circuit only

Distilled/Blended G. Heileman Brewing Co.

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
5th Floor, Capital Plaza
Frankfort, 40601

File #
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DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	12 Bot. 24—12 oz.	12 Bot. 12—12 oz.	Case 24—12 oz.	Case 12—12 oz.	Case 6—12 oz.	Case 3—12 oz.	6—12 oz.	3—12 oz.	6—12 oz.	3—12 oz.	12—12 oz.	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers				
Ky.	1.15	4.70		1.30	4.76	2.55			2.55	2.55			9.35	5.00						
"	1.25	4.70		1.30	4.76	2.55			2.55	2.55			9.35	5.00						
"	4.05	2.85			2.97	2.55			4.00				5.00	5.00						
"	2.25/2.55	2.55/2.85		1.97	2.97/3.55	2.55/2.85			4.00/5.00	4.00			5.00/5.00	5.00/5.00						

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———, 1973

Notary Public My Commission Expires

SIGNATURE ———

Title ———

457

16 Wagshal-Sheridan Pur Co.	Washington	Christian	Bldg only
17 Champion Dist Co	Lexington	Clothier/Gents	Bldg only
18 N.R. Dist Inc	Louisville	Jeff. Nicole + Ft Knox	
19 Quality Bev Co	Louisville	Jeff. Nicole + Ft Knox (Grant Cntl + Oldham in Jeff Co; Ft Knox only)	

C. Nelson Bear Co
Newport

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

File #:
Dept.

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

other size containers

	11-12 Rtd.	12-20 Rtd.	24-12 Cans	12-12 Cans	6-4-12 Cans	6-4-16 Cans	24-12 NR	6-4-16 NR	6-4-12 NR	6-4-16 NR	15-32 NR	Barrels	Barrels	Barrels	Barrels					
1	1.81	2.46	2.52	1.38	2.18	3.46			2.52	4.12	8.82		9.00	5.00						
A	1.90	2.47	2.82	1.36	2.20	3.59			2.99	4.19	8.36		10.00	5.00						
3	2.03	2.57		1.47	2.87	3.59			4.62	4.62	2.96		10.00	5.00						
4	1.91	2.46	2.65	1.38	2.71	3.46			2.52	4.12	4.26		9.00	5.00						
5	1.91	2.46	2.60	1.36	2.71	3.27			2.52	2.52	2.26		9.00	5.00						
6	1.71	2.57	2.27	1.47	2.17	3.59			2.52	2.52	2.96		10.00	5.00						
7	2.03	2.57	2.27	1.47	2.47	3.59			2.64	2.64	3.96		10.00	5.00						
8	1.91	2.46		1.38	2.12	3.46			4.12	4.12	2.26		8.00	5.00						
9	2.03	2.57		1.47	2.47	3.59			2.64	2.64	2.96		13.00	5.00						
10	2.03	2.57		1.47	2.77	3.59			2.64	2.64	3.96		12.00	5.00						
11	1.89	2.46	2.72	1.36	2.20	3.46			2.52	4.12	2.26		9.00	5.00						
12	1.91	2.46		1.38	2.12	3.46			2.52	2.52	2.26		8.00	5.00						
13	1.91	2.46	2.61	1.38	2.72	3.46			2.52	2.52	2.12		9.00	5.00						
14	2.21	2.57		1.47	2.72	3.59			2.52	2.52	2.26		9.00	5.00						

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———, 1972

Notary Public

My Commission Expires

SIGNATURE ———

Title ———

209

1. Geo. Bee Dist Co	Lexington -	Hazelton, Bee Woodford Jessamine a.
2. Jos Anderson Dist Co, Inc. Elsmere	-	Boone, Campbell, Gallatin, Pendleton, Scott & Campbell from Kenton Co & Campbell Kenton (& Bullitt & Nelson - Louisville)
3. Bard Dist Co - Lebanon.		Marion
4. Clark Co. Dist Co - Winchester		Clark, Montgomery Co
5 Combs Bro Dist, Inc	Hazard	Perry, Harlan? Co
6. Joe Fritz Dist	Cynthiana	Harrison
7. Hendrickson Bottling Co	Maysville	Mason, Bracken Lewis
8. Kentucky Ace Bev Dist, Inc	Hopkinsville	Ft. Campbell (in Ky)
9. A&L Dist Co	Henderson	Union, Henderson, Daviess Co
10. Smith Bros Dist Co	Bowling Green	Nelson, Bullitt (- Louisville in Jefferson)
11. La Fontaine Dist	Evansville	Franklin, Henry, Shelby & Anderson
12 Lowe Dist Co	Bowling Green	Warren
13 Madison Dist Co	Richmond	Madison Co.
14 A&L Dist, Inc	Louisville	Jeff. Bullitt & St. Mary's

G Heileman Brew Co
Wisconsin
Lacrosse Wis.

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

In Ralph G. Hon
Asst Sec

File
Depth

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

		24-12 Ret.	12-12 Ret.	24-12 Case	12-12 Case	4-6-12 Case	4-6-16 Case	24-12 NR	4-6-16 NR	4-6-12 NR	4-6-12 NR	12-12 NR	Barrels	½ Barrels	¼ Barrels	other size containers				
									32	29	40									
a	1	2.11	2.19	2.09	1.50	2.59	3.71		3.17	2.96/2.70	2.60	5.27		10.35	5.38					
a	2	1.95	–	–	1.50	2.42	3.47		3.17	2.32	2.38	2.15		10.00	5.00					
a	3	1.85	–	–	1.35	2.22 ?	3.29		3.17	2.32	2.38	2.15		10.00	5.00					
a	6	1.85	–	–	1.39	2.22	3.29		3.17	2.31/2.38	2.38	2.15		10.00	5.00					
a	5	1.98	–	–	1.39	2.38	3.48		3.59	2.54	2.54	2.32		11.16	5.55					
	Cash	1.78				2.46	3.13			2.42										
a	4	2.06	2.18	–	1.49	2.49	3.54 ?	–	3.31	2.77	2.77	3.08		10.75	5.55					
a	7	2.11	2.25	2.09	1.50	2.59	3.71	–	3.57	2.54/2.30	2.90	3.27		10.36	5.38					
a	8	2.06	2.18	–	1.49	2.39	3.31 ?	–	3.31	2.54	2.76	3.07		10.75	5.59					
	C.W.	1.78				2.46	3.13			2.42										
a	9	1.93	2.06	–	1.34	2.32	3.21		3.00	2.66	2.66	2.97		10.00	5.00					
a	10	1.93			1.49	2.54	3.40		3.17	2.50	2.50	2.71		8.75	4.38					
	C.W.	1.78				2.46	3.13			2.42										
a	11	1.93	2.06		1.34	2.32	3.21		3.00	2.66	2.66	2.97		10.00	5.00					
a	12	2.04	2.18		1.49	2.51	3.50		3.31	2.79	2.33	3.07		10.75	5.55					
	Cash	1.77				2.54				2.50										

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————————, 1972

Notary Public My Commission Expires

SIGN: ———————————

Title ———————————

211

1.	[illegible]		
2.	Clarke Co Dist Co	Winchester	Clarke Distillery Co.
3.	Joe Finty Dist	Lynchburg	Harrison Co.
4.	Ursula Dist, Inc.	Paris	Bourbon Co.
5.	Kentucky Ace Bon Dist Inc.	Hopkinsville	Christian Co
6.	Quality Bons, Inc.	Owensboro	Daviess Co.
7	Hoffman Dist Co.	Bardstown	Nelson, Bullitt, Marion
8	J. H Swell Dist Co	Burling Green	Warren
9.	Bryant B. Smith	Carrollton	Carroll, Henry, Gallatin, Shelby
10.	Bavarian Dist.	Covington	Campbell, Kenton, Boone (Boone for above + Kellogs, Carroll Co.
11.	J+B Smith Dist	Frankfort	Franklin
12.	Fulton Dist Co	Fulton	Fulton Co

G. Heileman Brg Co
Evansville

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

Duplicate

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24–12 Ret.	12–32 Ret.	24–12 Cans	12–32 Cans	4–4–12 Cans	4–4–16 Cans	24–12 NR	4–4–16 NR	4–4–12 NR	3–4–12 NR	12–32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers				
a	1.58	2.37		1.37	2.77	3.07		3.17	2.13	2.13	2.71		9.75	4.78						
b	2.06	3.58		1.60	2.99	3.52		3.31	2.77	2.77	3.07		10.75	5.55						
C.W.	1.78				2.45	3.13			2.42											
Co-op					2.52															
a	1.33			1.35	2.57	2.87		3.17	2.16	2.16	2.76		10.15	5.55						
C.W.	1.78				2.45	3.13			2.42											
b	1.80			1.39	2.77	3.27		3.17	2.39	2.39	2.85		1000	5.00						
a	2.06	3.58		1.60	2.99	3.52		3.31	2.42	2.42	3.07		10.75	5.55						
b	1.80			1.39	2.99	3.27		3.17	2.39	2.39	2.85		10.00	5.00						
d Tap/Draw					2.89															

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 1972

Notary Public My Commission Expires

SIGNA ———————

Title ———————

218

13. Berry Dist. Inc — Hazard — Perry, + 1 Co.
14. Wm Burton — Henderson — Henderson + Union
15. Ford Bev. Dist — Hopkinsville — Christian Co — * 2 Dist? See #5
16. C.K. Dist. Co. Inc? — Lexington — Fayette, Jessamine, Woodford + Anderson
17. Stanley Dist Co — Portsmouth — McCracken
18. Richmond Bottling Works, Inc — Richmond — Madison
19. H+R Dist, Inc — Inc — Jeff. Mun. St Louis
(Great Lakes Bev only)

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

Winston Salem N.C. Plant

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24-12 Btl.	12-22 Btl.	24-12 Cans	12-22 Cans	6-4-12 Cans	6-4-10 Cans	24-12 NR	6-4-10 NR	6-4-12 NR	3-4-12 NR	12-22 NR	Barrels	½ Barrels	¼ Barrels	⅙ Barrels	other size containers 1/4/16	4 L.C.F. Cans	4-L.10 Cans	30/7 Can
1	3.09			1.49	3.47	3.19			3.00							3.78		4.91	
2	3.21			1.67	3.11	3.06	2.99		3.01	2.94	3.41		11.80	6.40				2.94	3.11
3	3.09				3.09	3.79			2.96		3.15		11.94						
4	3.11				3.11	3.71			2.95		3.09					3.41			
5	3.09		2.88	1.46	3.09	3.49			2.94		3.09					3.26			
6	3.34				3.34	4.07			3.08										
7	3.36		3.09		3.34	4.05			3.11		3.29		12.33						
8	3.14		2.88	1.63	3.19	3.34	3.06		3.06		3.22		12.13	6.02		3.34			3.15
9	3.09		2.85	1.62	3.17	3.33			3.03		3.22		11.14						
10					3.14	3.88			2.91										
11	3.18			1.65	3.19	3.31			2.94		3.20		11.94						3.01
12	3.09		2.95		3.04	3.64			2.96		3.22					3.34			

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————————, 1973

Notary Public My Commission Expires

SIGNATURE ———————————

Title

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

All Milwaukee

Winston Salem Plant

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24–12 Bot.	12–32 Bot.	24–12 Cans	12–32 Cans	4–6–32 Cans	4–6–16 Cans	24–12 NR	4–6–16 NR	4–6–32 NR	3–6–32 NR	12–32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers 3.6 7 bbl	1/6 - 1/4 9 Gal		
1	241				233	341			241										
2 —																			
3	243				246	306.88			243										
4																			
5 —																			
6 —																			
7					247	344.95					281.85		1198			88	288		
7			252	142	250	334										256			
9	240				233	341			2.61				10.34			2.61			
10 —																			
11 —																			
12	233		246	132	232	319				238	263								

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined the return, including accompanying schedules, and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 197—

Notary Public My Commission Expires

SIGNATURE ———————

Title ———————

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	6-12 Btl.	12-22 Btl.	24-12 Cans	72-12 Cans	4-6-12 Cans	4-6-16 Cans	24-12 NR	4-6-16 NRB	4-6-12 NRB	3-6-12 NRB	15-32 NRB	Barrels	½ Barrels	¼ Barrels	⅙ Barrels	½ Barrel Kegs	other size containers		
1	4.55/24.75				5.70/30.75	5.40/29.25			2.80/15.75										
2																			
3	24.-/27.-			1.80/12.50	2.40/13.50				2.40/13.50										
4						2.00/11.25													
5																			
6																			
7	3.70/20.75				3.30/18.-	3.30/17.50			4.40/23.75										
8	3.60/19.50		45.-/45.-	1.00/5.75	2.70/14.-	3.15/16.50					3.30/17.50		21.50/115.			2.75/14.50			
9	3.60/19.50				2.85/15.75	3.15/16.50			5.-/26.50				2.25/11.75			2.25/11.75			
10																			
11																			
12	3.30/18.-		2.55/13.75	1.35/7.25	2.70/14.-	3.15/16.50			2.25/11.75	2.00/10.-									

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ——— ———, 19—

Notary Public My Commission Expires

SIGN. OFFICER ———

Title ———

5th Floor, Capitol Annex
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

FC 28

Name and address of distributor	Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.	other size containers

Effective Date	24–12 Bot.	12–32 Bot.	24–12 Cans	12–32 Cans	4–6–12 Cans	4–6–16 Cans	24–12 NR	4–6–16 NR	4–6–12 NR	2–6–12 NR	12–32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels					
	2.12	2.67	2.91	1.05	3.01	3.50	—	—	2.71	2.71	3.03	—	11.00	1.32	—					
	(-.)				(-.)	0			(-.)	(-.)	(-.)									
	(.)	(-.)	(.)		(.)	(.)			(.)	(.)	(.)		(.)	(.)						
		(.)	(.)	(.)	(.)				(.)	(.)			(.)	(.)						
	(.)	(.)	(.)	(.)	(.)	(.)			(.)	(.)			(.)	(.)						

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

FC 28

Subscribed and sworn to before me this the ——— day of ———————, 1973

Notary Pub. My Commission Expires

SIGNATURE ———————— OFFICIAL

Title ————————

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Ret.	12—32 Ret.	24—12 Case	12—32 Case	4—6—16 Case	4—6—16 Case	24—12 NR	4—6—16 NR	4—6—12 NR	3—6—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers			

- Smith Pipe & Fit. Pittsburgh (Allegheny (— Pittsburgh), Washington)
- J.B. Dist. Co. - Boston Co. (City of Boston in Worcester Co. and
- Acme Dist Co. Carrollton (Carroll, Harford, Howard; Henry Co. of Carroll Co., Shelby City of Shelby Co.)
Chas Selzman Dist Co. Covington (Boone, Kenton, Campbell)
Big O Bev - Frankfort (Franklin)
Penn Distrib. Co. Hazard (Perry)
Edward Valley Dist. Co. Henderson (Union, Henderson)
- O.E Dist. Company - Elizabethtown (Hardin)
- Bernie Robinson Inc. Paris (Fayette, Woodford, Clark, Bourbon - Jessamine, Scott, Boone, Kenton, Campbell Co.)
Nicholasville (Jessamine)
- H & R Dist. Louisville - (Jefferson, Meade) City of Louisville and Jefferson, Bullitt, Henry
- Capron Bev Co. Maysville (Mason (Lewis, Bracken)
Brooksville (Mason)
- J.F. Schuster, Sons, Inc. Middlesboro (Harlan) - city of Middlesboro, Cumberland Co.)
- Quality Bev. Dist Co. Owensboro (Daviess)
- Wagner Dist Co. Paducah (McCracken, Fulton)
(Ballard, Carlisle, Graves)
- Ballard Beverage Dist, Inc - Paducah (McCracken, Fulton)
(Ballard Co.)
- Madison Dist Co. Richmond (Madison - city of Richmond)

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
5th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24–12 Ret.	12–32 Ret.	24–12 Cans	12–12 Cans TT	4–6–12 Cans TT	4–6–16 Cans TT	24–12 NR	4–6–16 NR	1–6–12 NR	3–8–12 NR	12–32 NR	Other size containers: Barrels	½ Barrels	¼ Barrels	⅙ Barrels			
1																		
2	2.10			1.92	1.70	1.82			2.14		2.25							
3																		
4																		
5																		
6																		
7																		
8	2.70			1.35	2.34	2.82			2.64		2.93							
9																		
10																		
11																		
12	2.33			—	2.34	2.52			2.64		2.93							
13																		
14																		
15	2.50			1.35	2.60	2.82			2.31		2.85							
16																		

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ——— ———, 1972

Notary P. My Commission Expires

SIGNATURE ———

Title ———

221

ABC Form 6D

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Bot.	12—32 Bot.	24—12 Cans	12—32 Cans	4—6—12 Cans	4—6—16 Cans	24—12 NR	4—6—16 NR	4—6—12 NR	3—6—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅙ Barrels	other size containers			
1									4.17										
2																			
3																			
4																			
5																			
6																			
7																			
8																			
9																			
10																			
11																			
12																			
13																			
14																			
15																			
16																			

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————————, 1972

SIGNATURE ———————————

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Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capitol Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

other size containers

	24—12 Btl.	12—30 Btl.	24—12 Cans	12—12 Cans	4—6—12 Cans	4—6—16 Cans	24—12 NR	4—6—16 NR	4—6—12 NR	3—8—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels				
1					3.22														
2					3.9														
3					2.52	4.68													
4					"	4.29													
5					"	—					3.42								
6					3.42	"	4.52	"											
7					"	"													
8					"	"													
9					"	"													
10					"	"													
11					"	"													
12					"	4.08													
13					—	"													
14					3.0	4.19													

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 1972

Notary Public My Commission Expires

SIGNATURE ———————

Title ———————

228

Lexington

Hudepohl Brewing
505 West
Cinn., Ohio 45203

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
10th Floor, Capital Plaza
Frankfort, 40601

1st Hudepohl Peak Season
Sales by

Dec

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

other size containers

	24—12 Ret.	12—32 Ret.	24—12 Case	12—12 Cans	6—6—12 Cans	6—6—16 Cans	24—12 NR	6—6—16 NR	6—6—12 NR	3—8—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅙ Barrels	n/a 40#			
1	2.35	3.04	—	1.14	3.07	—	—	—	—	2.96	3.26	23.34	11.67	6.06	1	1.135			
2	2.08	2.70	—	1.50	3.03	—	—	—	—	2.70	3.05	—	10.87	5.64	—	1.84			
3	"	"	—	"	"					"	"		"	"		"			
4	"	"		"	"					"	"		"	"		"			
5	"	"		"	"					"	"		"	"		"			
6	"	"		"	"					"	"		"	"		"			
7	2.35	3.04		1.14	3.07					2.96	3.26	23.34	11.67	6.06		1.135			

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———, 1972

Notary Public My Commission Expires

SIGN/ ———

Title ———

224

1. L. Dorsey Bourbon Newport

2. Monarch Dist Co Richmond
3. Quality Bourbon Louisville
4. Bennie Robinson, Inc Lexington
   Cynthiana Bbn Co Maysville
5. Cynthiana Sales Agt Co Cynthiana
7. H Clement Whsl Co of Ky Newport

7 Wdr - Consol Liq Co (except other ... Woodford, Sunlight Dist, Paris, Wright and Wh, Old Spring, Custom Rectifying, Dayton.) Kentucky Co (except other 2 Covington, Latonia, Pearl Hills, Sunset, Elgewood, Look out Wh, Ft Wright, Ft Mitchell, Ft Int Mitchell, Erlanger, Ludlow. all of Boone Co

T Wdr - Ace Gallatin Distillery Co

Monarch

Quality, Bourbon Co - Monarch Co ? maybe

Monarch

Bennie Robinson, Inc Lexington

Cynthiana Bbn Co Maysville

Monarch, Bourbon Sales Agt Co

Cynthiana

Clement Co (Newport Woodford, Sunlight, H Thomas, Wright Wh, Old Spring, Custom, Bellevue, Dayton.
Kentucky Co (Covington, Latonia, Pearl Hill, Sunset Hills, Elgewood, Lookout Wh, Ft Wright, Ft Mitchell, Ft Int Mitchell, Erlanger, Elsmere, Ludlow, Bromley

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Ret.	12—32 Ret.	24—12 Cans	12—32 Cans	4—16 Cans	4—16 Cans	24—12 NR	4—16 NR	4—12 NR	2—4—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	Tulpa	24/12 oz Cans	other size containers 24/12 oz Cans ½ PK	24/12 oz Cans ⅛ PK
1	2.14				2.89	3.15			2.14		3.01		10.71			3.17	2.94		
2	1.90	2.55	2.84	2.74	2.84	3.28			2.54	2.54	2.71		10.00			2.54		2.32	1.90
3	2.225	2.555		2.80	2.70	3.25				2.62	2.82		9.50			2.60		2.125	1.90
4	1.79	2.41		2.51	2.71	3.49			2.33	2.35	2.69		10.00					1.69	
5	1.95		2.12	2.72	2.72	3.43			2.14										
6	2.12	2.55	2.84	2.76	2.84	3.43			2.25	2.25	2.94		10.71	5.40		2.25		2.22	2.42
7	1.97	2.31 2.81	2.69	2.69	2.69	3.15			2.29	2.29	2.81	21.42	10.71			2.46		2.07	1.97
8-A	2.02		2.76	2.76	2.76	3.27			2.52		2.72		10.71	5.40		2.90		2.12	
8-B	1.97	2.56	2.69	2.69	2.69	3.38			2.45			21.42	10.71					2.07	1.97
10-000	1.92	2.45	2.72	2.68	2.72	3.22			2.35	2.35	2.69					2.50			1.92
11	2.22		2.74	2.84	3.62				2.60		3.035		10.71			2.45		2.22	2.22
12	1.94	2.40	2.64	2.35	2.55	3.20			2.40	2.40	2.76					2.40		2.09	1.70
13-A	1.96	2.45	2.82	2.72	2.82	3.46			2.46	2.46	3.14		10.00			2.44	3.00		

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————————, 1971

Notary Public My Commission Expires

SIGNATURE ———————————

TITLE ———————————

1. (illegible)
2. Champion Distr Co — Lexington (Lenoir, Fayette, Clark, Montgomery, Davidson)
   Wentford (Orange, Alamance, Guilford only)
3. Ed Phares Dist Co — Newport - (Boone, Campbell, Jessamine, Scott, Carroll)
4. Capitol City Whole Inc. - Frankfort (Franklin, Henry, Shelby) Wentford Nash also but Versailles Boyle
5. Wm Smith - Hart. Smith Dist Bowling Green - (Ballitt, Nelson, Marion, Hardin - Ft Knox)
6. Meyer Dist Co. - Bardstown - (Mercer, Taylor, Buckman)
7. Crenshaw Dist. Co - Lawrenceburg. (Anderson)
8. Bowling Green Bev Co/Inc - Bowling Green (Warren Co - city of Ft Knox only)
9. U.S. Steele - Owensboro (Daviess)
10. Rich and Bthy. Inc. Richmond. Madison (Richmond only)
11. Henderson Dist Co - Henderson (Union - Webster)
12. Berry Dist, Inc Hazard (Perry - Harlan (city of Cumberland only)
13. Hall. Dist Inc Inc. Jefferson - Ft. Knox

Anheuser Busch / Budweiser Bike
(Jerseyville)

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name ... ress of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Ret.	12—32 Ret.	24—12 Cans	12—32 Cans	4—6—12 Cans	4—6—16 Cans	24—12 NR	4—6—16 NR	4—6—12 NR	2—6—12 NR	12—32 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers: Keeley 1/2	other size containers: Keeley 4-6-12		
1					2.61/3.26												2.625		
2					4.51/3.26								89.50/—			1.12	2.25		
3																	2.40		
4					2.40/3.26												2.40		
5					2.40/3.26												2.42		
6					" "											1.12	2.625		
7					" "												2.42		
8					" "											1.12	2.625		
9					" "											1.12	2.625		
10					" "												2.40		
11					" "											1.12	2.625 + (in 12-oz C...		
12					" "												2.42		
13					2.39/3.26												2.40		
NC: BEER only					2.58/3.07														

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ____ day of _____, 1972

Notary Public My Commission Expires

SIGNATURE _____

Title _____

228

14. Charles Schigmanski 6. Company (Campbell, Carroll, Lasky, Fellows, Bowe)

Louisville Market

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

File in Duplicate

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	11-12 Ret.	12-32 Ret.	24-32 Cans	12-12 Cans	4-6-12 Cans	4-6-16 Cans	24-12 NR	4-6-16 NR	4-6-12 NR	3-6-12 NR	12-32 NR	Barrels	Barrels	Barrels	Barrels	30/1 NR	6-pk NR 7	other size containers 9.2 BW		
A Corp	5.10	3.90	3.87	1.95	3.70	4.50	-	-	3.75	3.75	4.50		15.50	9.00						
	5.10	3.90	3.87	1.95	3.90	4.50			3.75	3.75	4.50		16.00			3.10				
	5.10			1.95	3.93	4.12		4.45	3.75	3.75	4.50		14.00							
	3.90			1.95	4.50	5.65	4.34		4.34				11.50			3.65	5.90			
									4.35											
					4.00															
					4.30	5.25														
					3.72	4.92														
	5.10	3.90	3.87	1.95	3.93	4.50		4.45	3.75	3.75	4.50		15.50	9.00						
	5.10				3.90	4.50		3.75					15.00							
	5.90		4.50		4.32	5.22		4.30			5.15		17.45			3.80				
							4.95		4.95				9.45					24.30		
									11.50											
	2.25				3.90															

Stein for Sub 67 - 14.40 + 5.85 = 20.25

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 1972

Notary Public ——— My Commission Expires

SIGNA ———————

Title ———————

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Appendix 8B

Louisville Distrib. - pg 2 Cont'd

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

File in Duplicate

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (If a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24-12 Btl.	12-16 Btl.	24-12 Cans	12-12 Cans	4-6-12 Cans	4-6-16 Cans	24-12 NR	4-6-12 NR	4-6-12 NR	15-16 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers 30½ gal Bbl.				
[illegible]	3.10				3.90				3.75										
[illegible]	3.10				3.90														
[illegible]	3.10				3.90														
[illegible]	3.10																		
[illegible]	3.10				3.90				3.75		4.50								
[illegible]	3.90		4.30	2.15	4.30	5.15	4.30		4.30		5.15		17.25	10.00		3.75			
[illegible]					5.40				5.40				20.00	12.50					
[illegible]					4.10	5.60													
[illegible]	3.10	3.90	3.90	1.95	3.90	4.10			3.75	3.75	4.50		16.50	9.00					
[illegible]					3.50														
[illegible]	3.10	3.90	3.90	1.95	3.90	4.50			3.75	3.75	4.50		[illegible] 10	9.00					
[illegible] (65)					2.25														
[illegible]					3.51				3.24										

Distrib - 24/12 oz Bottle 240 to 100 case lot
1 sheet a title

Wholesaler - 24/12 oz Bottle 240 to 100 case lot
1 sheet filming on title

Subscribed and sworn to before me this the ___ day of _____, 1972

Notary Public My Commission Expires

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

SIGNA... _____

Title _____

Barlstown (Nelson Co.)
Market

Commonwealth of Kentucky
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
8th Floor, Capital Plaza
Frankfort, 40601

Form 6,
Duplic

DISTRIBUTOR'S PRICE SCHEDULES AND TRADING AREA DESCRIPTIONS

Name and address of distributor

Trading area description of distributor (if a brewery has more than one distributor in a county or city, show on a map your trading area and attach to this schedule.

	24—12 Bot.	12—24 Bot.	24—12 Cans	12—12 Cans	24—12 Cans	24—16 Cans	24—32 NR	1—6—16 NR	1—6—12 NR	1—6—12 NR	15—48 NR	Barrels	½ Barrels	¼ Barrels	⅛ Barrels	other size containers 24/12 Cans	12/12 NR			
Bud	3.46			2.10	4.30	5.15	6.15			9.25										
Falls	3.10				3.90															
Miller	3.10				3.90															
Coors					3.90															
Pabst	3.90				4.30					9.25										
Budweiser	3.10			1.85	3.90	4.60		4.50		8.75		4.50		11.00	1.00					
Schlitz	3.10			1.75	3.90			4.50		8.75						4.50				
Ballantine	3.10				3.90															
Falstaff	3.10			1.95	3.90	4.60				8.75						1.77½				
Old Milwaukee	3.10				3.90	4.60				8.75										
Schlitz	3.80			2.10	4.30	5.15				9.25										

AFFIDAVIT

I, the undersigned, a principal officer of the above named distributor, do solemnly swear that I have examined this return (including accompanying schedules) and it is, to the best of my knowledge and belief, a true, correct, and complete report.

Subscribed and sworn to before me this the ——— day of ———————, 1972

Notary ——— My Commission Expires

SIGNA ———————

Title ———————

DEFENDANT'S TRIAL EXHIBIT 66

DEPOSITION OF EARL E. SCHMADEL

[13] [Q.] When did those difficulties arise:

A. It would be difficult to put a definite date on the beginning, but it was a gradual trend of loss of business—particularly, Falls City business—to the people who were buying their beer in Kentucky.

Q. Well, could you put a date on that?

A. I would have to give you an approximate time, and I would say that that would be about 1971 or 2.

* * * *

Q. And you attribute the financial [14] difficulties that existed, let's say, from 1971—to until 1977, to the fact that people in Evansville were going to Kentucky to buy Falls City Beer?

A. Yes, sir.

Q. That would be the only cause, in your judgment?

A. That would be a major contributing cause. I wouldn't deny that there might be other causes, but I don't know about that.

* * * *

[64] Q. Where is the largest part of your volume sold? Is it sold in the package-stores and supermarkets as compared to the restaurants and taverns?

A. It would be difficult to say which is the larger, comparing the two. I would say that in this locality, about half of our volume of Falls City is sold in restaurants and taverns, where it's consumed on the premises, and about half of it is sold in places where they take it with them—carry-out—and it's consumed elsewhere.

* * * *

[76] Q. Is this generally referred to as the Evansville market? Is that what you—the way you look at it?

A. No, no. The Evansville market includes a much larger territory that [sic] that: Part of Illinois, and Posey County, Indiana, and Vanderburgh County, Kentucky; and Gibson County, Indiana; and Warrick County, Indiana; and Henderson County, Kentucky, are all of the Evansville market.

The papers Falls City sends me include a greater number of other counties besides Vanderburgh, when we talk about the Evansville market area.

Q. What are you saying, then, when you see the term "Evansville"? Does that mean to you this broad area, including all these adjoining counties and part of Illinois, and part of Kentucky? Is that what you are saying?

A. I'm saying that it—the [77] information that I get from these other people include that.

I look at Evansville and Henderson, Kentucky, as sort of an integrated area, because they are so close together, you know, that people flow from one community to the other, back and forth. And there is no toll; no divider between the states. I mean, there is thousands and thousands of cars going back and forth across those twin-bridges.

Q. How far is Henderson from Evansville?

MR. CUSACK: From the city limits of Evansville or from the downtown area?

Q. How far from downtown Evansville to downtown Henderson?

A. About five miles.

Q. How long does it take you—one to drive it?

A. About ten minutes.

* * * *

[88] Q. Let me put the question in another way: If the brewery raises its price, will there always be a change or an increase, I should say in the wholesale price?

A. Only part of the time. Sometimes not.

Q. So that sometimes, the brewery will raise the price, and the wholesalers will absorb the brewery's price increase?

A. Exactly.

* * * *

[92] [Q.] Have retail accounts of yours in Evansville complained to you that they could not be competitive with Henderson retailers because of the differences in their costs?

A. Yes, sir.

Q. Could you tell us who has complained to that effect?

A. There've been any number of—who complained, that I didn't remember. But the President of the State Liquor Store Association operates a place called Continental Party Mart, and he went along—and I don't remember his name, and I should; but I don't remember—he went along with me to testify on this Legislation concerning this same problem, and it was his complaint that he couldn't compete; his place of business being located on Highway 41.

Q. This is Continental Party Mart in Evansville?

A. Yes, sir.

Q. Is it between Evansville and Henderson?

[93] A. No, sir. It's in Evansville.

Q. And did he give testimony before the Committee to that effect?

A. He went up there at the same time I went up. And I assume that he did, although I was not present when he did.

But I know he went up for that purpose.

Q. And he was complaining about this incident that you talked about, earlier in the summer of '74?

A. He was complaining about the general price situation, and him having to pay so much more than his counterpart in Henderson County, that he couldn't compete.

* * * *

[106] Q. Despite this advertising, your Falls City sales continue to decline, don't they, Mr. Schmadel?

A. Yes, sir.

Q. Do you have an explanation for why that's so?

A. Well, a number of factors would have to be considered by me before I could answer that [107] question. And I would have to consider the consumers going over to Kentucky to buy beer as part of it.

Q. So that the decline in 1975, 1976 and 1977, you attributed to consumers going over to Kentucky?

A. At least partly during that time.

Q. Any other factors, Mr. Schmadel, that would enter into this?

A. Well, it's difficult to be definite about trends of sales of a product. It depends on, for example, the age bracket of the Falls City drinkers.

At one time, when I started in the business, we sold most of the beer consumed by the twenty-five to forty-five-year old consumer.

Now, those people are forty-five to sixty-five years old, now, and there aren't as many of them left. The trend sort of stays with the age bracket, and we are now in the age bracket where there are less consumers; and some of them are retired and don't have the money to pay for beer that they used to have.

And so, a number of factors [108] enter into that.

But one of them is the people who go over to Kentucky and buy their beer.

Q. So, you would expect that a distributor, that wasn't near Kentucky and didn't have that problem, wouldn't be experiencing the same decline as you are?

A. It all depends on who it was.

Q. Yes.

A. He may be experiencing the same decline but for different reasons.

* * * *

[117] Q. Well, now, do you recall any specific meetings you had—

A. (Interrupting) No, sir.

Q. (Continuing) At the brewery, with Mr. Peter?

A. No, sir. I don't recall any specific meetings that I had with Mr. Peter down at my office, except that along about this time, they increased their prices to us. And Mr. Peter came down to talk about that.

Now, the prices may be or may be not have a very compelling influence on sales, but at this time—or immediately before this July the 9th—we had had, in the State of Indiana, various price increases by distributors for Falls City Beer, [118] but we had not increased our prices to our customers.

Mr. Peter came down to my office—made a special visit to talk to me about that—and informed me that if we raised our prices, that they would have to raise their price to us.

And that was the purpose of his meeting. He was not interested in any other problems, just in price.

He was trying to force us to retain the prices that we had, and if we didn't, he, of course, threatened, which immediately happened, that they raised their prices to us.

We raised our prices, and they increased their price to us immediately following.

Q. You're talking, now, about what—in June of '73?

A. Just before July of '73.

Q. I see.

Now, you are testifying, are you, sir, that prior to this time, your competing distributors in the Evansville market had raised their prices on brands of beer with which the Vanco brands compete, but you had not gone up. Is that what you are saying?

[119] A. No, that's not what I said, at all. Other distributors of Falls City Beer had increased their prices all around the state, but we had not yet increased our prices.

Q. And, of course, sir, you were competing in the Evansville market—not with the other Falls City dis-

tributors in Indiana but with the Working Beverage, Pocket Beverage and the others that you identified this morning?

A. That's right. But that is not what Mr. Peter came down to talk to me about. He came down to talk to me about the other distributors who had increased their prices, without the brewery having increased the Indiana prices. And he told me that we should not increase our prices—or if we did, the brewery would increase their price to us.

* * * *

[166] Q. Now, you testified before that at the time the House of Beverage was running these ads, and these news stories were appearing, you went to the House of Beverage lot and you observed Evansville cars there, and people taking out beer?

A. At about that time.

Q. But you didn't go back after that—let's say last year or the year before that—and observe what was going on in the House of Beverage parking lot?

A. I have observed the House of Beverage parking lot one or two times in the summertime, every year.

Q. Oh, you have.

A. Yes, sir.

Q. But you have made no record of what you observed? Correct?

A. No, sir.

Q. Did the gap between the beer prices in Henderson and Evansville narrow after this period with the so-called price wars that was reported in the paper.

[167] MR. CUSACK: You are referring to retail prices?

MR. ADLER: Retail prices, yes.

A. Mr. Adler, I can only tell you that after that, they did. But when after, I don't remember; or how much, I don't remember.

Q. When you went to the House of Beverage, say, once or twice every summer, did you see them carrying out Falls City Beer, or did you see that on those occasions?

A. I have never been there, that I didn't observe at least one or two people carrying out Falls City Beer, with Evansville license plates on their cars or their boat trailer, at varying times that I watched it; of course, I didn't stay there. I stayed there for a little while; maybe run an errand or two, and come back.

But I always watched—

* * * *

[205] Q. Mr. Schmadel, Mr. Tate testified during his deposition that Falls City sold beer to its Kentucky distributors at approximately Fifty Cents a case less than Falls City sold beer to Indiana distributors.

In your opinion, sir, is that [206] the major reason for the differential in prices, retail prices, between the Henderson County retailers and the retailers located in the Vanderburgh County area?

A. It would be a big reason; yes, sir.

Q. At the present time, sir, approximately what percentage of the total volume of Vanco Beverages is of Falls City products?

A. I would have to guess at that, Mr. Cusack. I really don't know.

Q. Would you give us your best estimate?

A. A third; thirty-five percent.

* * * *

[208] Q. Thank you, sir. Now, Mr. Adler asked you in regard to Vanco not being able to get Miller Beer.

Do you have any knowledge or information in connection with the level at which Billy Beer was sold in this area, by Working Beverage?

A. Yes. The introduction of Billy Beer into Evansville was conducted by the Falls City Brewery people, and they completely ignored Vanco. And we were ready, willing and able to take it and to handle it. They wanted

to include that into our franchise, but they did not. They went over to Milton Working, who just happened to be a close personal friend of Emil Peter, and gave the beer to him.

And he wanted to sell it at popular price. And he called Emil, and Emil said, "No, don't sell it at that, sell it the same as Premium Beer; the same as Budweiser and Miller's."

Q. And did he do so?

A. Yes. That's what he did, and he didn't sell.

[209] Q. And that's why there are no sales of Billy Beer in the area?

A. That's one of the reasons.

Q. Do you have any knowledge—

MR. ADLER: (Interrupting) I object. I object.

Q. (Continuing) Or information in regard to brewery pressure on Kentucky wholesalers in regard to the mark-up of beer sold in Kentucky?

MR. ADLER: I object.

A. I only know what they tell me, and they—

MR. ADLER: (Interrupting) I object. That is pure hearsay.

Q. Please continue.

A. What they tell me is that they are afraid that the brewery will terminate them which, under the Kentucky Law, they are permitted to do, unless they don't—unless they do what the brewery tells them to do.

Q. Is Falls City the only brewery left in Kentucky?

A. No. There is one in Newport, I think.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 81-1271

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.

ORDER ALLOWING CERTIORARI

Filed March 1, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, limited to Questions 1 and 2 presented by the petition.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

RESPONDENT VANCO BEVERAGE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that the plaintiff's evidence that it lost sales volume and profits as a result of the defendant's price discrimination was sufficient to demonstrate the competitive injury and antitrust injury required to sustain a recovery for a Robinson-Patman Act violation?

2. Whether the Court of Appeals was correct in holding that the defendant had not proved the good faith meeting competition defense of Section 2(b) of the Robinson-Patman Act where the defendant presented no evidence that its lower prices to the plaintiff's competitor were established to meet prices offered by the defendant's own competitors?

3. Whether the Court of Appeals was correct in holding that as a matter of fact the defendant overcharged the plaintiff for state excise taxes?

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* This opinion was withdrawn from the bound volume of 652 F.2d for amendment and will be republished. As of the time this brief was printed, the opinion had not yet been republished.

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Respondent.

RESPONDENT VANCO BEVERAGE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Vanco Beverage, Inc. ("Vanco") accepts as adequate the statements by Falls City Industries, Inc. ("Falls City") of the portions of its Petition for a Writ of Certiorari entitled Opinions Below, Jurisdiction and Statutes Involved.

STATEMENT OF THE CASE

Introduction

This is a classic secondary-level Robinson-Patman Act case. Falls City sold beer to two of its wholesale distributor customers located in a single relevant market at substantially different prices for more than six years without any justification. Vanco, the plaintiff, was Falls City's disfavored purchaser in the relevant market while Dawson Springs was Falls City's favored customer in the relevant market. Falls City's price discrimination injured Vanco. Vanco's retail customers and consumers. The loss of sales and profits by Vanco is clearly the type of antitrust

injury prohibited by the Robinson-Patman Act and redressable under the Clayton Act. This case presents none of the legal questions proposed by the Petitioner to this Court. The only disputes are whether Vanco proved it was injured and whether Falls City failed to justify its discrimination by establishing that it was in good faith "meeting competition".

This brief will show that there is no real question that Vanco proved that it suffered substantial competitive and antitrust injury as a result of Falls City's price discrimination. Vanco introduced massive evidence, which is summarized later in this brief, that Falls City's price discrimination resulted in lower retail beer prices across the nearby Kentucky border and that consumers traveled to Kentucky for the cheaper beer. By Falls City's own admission, the lower Kentucky prices caused a loss of volume to Vanco.

This brief will also show that this case does not present the question of whether adoption of a competitor's pricing system can constitute a valid meeting competition defense. Falls City never established as a fact that it lowered its price to meet any competitor's prices. Falls City never reduced its prices to its Kentucky distributors or to Vanco. Falls City increased both sets of prices throughout the relevant period and increased them more frequently and in larger amounts to Vanco than to its Kentucky competitors. Furthermore, Falls City's competitors had prices that varied throughout Kentucky, while Falls City charged one price for the whole state, and Falls City's Kentucky price was not set to meet any specific price of its competitors.

The only other issue presented by the Petitioner, whether Falls City overcharged Vanco for state excise taxes, involves a trivial fact question which this brief will show was decided correctly by the trial and appellate courts and which is not worthy of consideration by this Court.

Factual Background

Many of the most important facts in this case are not in dispute. Falls City was, until November, 1978, a beer brewer with distributors located in thirteen states. Each distributor picked up its beer at the loading dock of Falls City's Louisville, Kentucky brewery, the price in each instance being F.O.B. the brewery. Falls City sold only one grade and quality of each brand of beer. Falls City established prices for its beer on a state-wide basis, so that distributors from each state picking up beer at Falls City's brewery paid the same price as other Falls City distributors located in the same state, but different prices from distributors located in different states.

One result of Falls City's state-wide pricing policy was that Vanco, which was located in Evansville, Indiana, contiguous to the Kentucky border,[1] was charged from 10%-29% more than Falls City charged Vanco's Kentucky competitor in the same relevant market for the identical beer during the entire six year period (PX 87).

Because of the price discrimination, Vanco's competitor could offer lower prices to its beer retailers which, in turn, were enabled to and did offer lower prices to beer con-

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[1] Vanco's competitior was located in Henderson, Kentucky which is a suburb of Evansville, Indiana. (DX 217, p. 18-19). Both are in the Evansville, Indiana-Kentucky Standard Metropolitan Statistical Area ("SMSA"). An SMSA is an integrated economic and social unit with a recognized urban population nucleus of substantial size. They are classified by the Statistical Policy Division of the Office of Management and Budget, Executive Office of the President (PX 32). (References to the record are as follows: transcript, "Tr."; plaintiff's exhibits, "PX"; defendant's exhibits, "DX"; depositions, "Dep.". References to the opinions of the trial and appellate courts will be made to the appendix of Falls City's Petition for a Writ of Certiorari and designated "Pet." Vanco has provided a short appendix to this Brief in Opposition, which is designated as "Supp.A.").

sumers than Vanco's retailers were able to offer. Both Indiana and Kentucky had laws requiring their retailers to purchase beer only from in-state distributors. Each distributor was allotted a territory within which it was to distribute its beer. Hence Vanco and Dawson Springs, Vanco's Kentucky competitor, did not compete directly for sales to retailers. They did, however, as Falls City has conceded, compete for retail sales through their respective retailer customers (PX 3, 11, 12, Supp.A-1-4; PX 160; Tr. 222, 519-520, 977). As specifically noted by the appellate court, there is "ample evidence" that consumers were actually drawn to purchase beer from retailers offering the lower prices (Pet. 8a). As a result, Vanco's retailers lost sales and curtailed purchases from Vanco (Pet. 8a). Contemporaneous sales reports written by Falls City's own District Manager attribute sales losses of Vanco to lower prices offered by the retailers of the favored distributor (PX 3, 11, 12; Supp.A-1-4; PX 160).

The trial court noted, and the appellate court agreed, that Falls City was losing sales to national brands and that some of Vanco's volume decline may have been attributable to Falls City's decline. Both courts were convinced, however, that based on direct evidence of consumers seeking out the cheaper beer of retailers served by Vanco's competitor and on statistical evidence of the relative rates of volume decline among various distributors, a significant portion of Vanco's decline was attributable to Falls City's price discrimination (Pet. 6a, 8a-9a, 32a-34a, 36a-37a). The appellate court noted that Falls City's sales were declining generally, but pointed out that Vanco's sales declined almost 60%, while the sales of the favored competitor, located in the same market as Vanco, declined only 40% (Pet. 8a-9a).[2]

[2] The trial court also found that the percentage of sales of the favored purchaser attributable to carry-out accounts was significantly higher than was Vanco's, confirming that Vanco's sales decline was not just from Falls City's waning popularity, but from carry-out customers traveling for cheap beer (Pet. 32a-33a).

The evidence of competitive injury was succinctly summarized by the appellate court, with no dissent on this issue:

> Here it is not disputed that Falls City over a six-year period charged Vanco prices varying from approximately 10% to 30% higher than it charged Dawson Springs and other Kentucky distributors. The record indicates that Vanco passed on some of this price differential, which is indisputably substantial, to its customers, that the relevant retail beer prices in Evansville were $.50 to $1.50 higher per case than in Henderson County during the relevant period, and that Vanco over the same period suffered a sharp decline in Falls City beer sales. (Pet. 8a.)
>
> • • • •
>
> Moreover, there is testimony in the record to support the conclusion that the major reason for the higher Indiana retail beer prices was the higher prices charged Indiana distributors, and there is ample evidence, summarized by the district court, that the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail purchases from Vanco. (Pet. 8a.)
>
> • • • •

Other evidence presented by Vanco refutes Falls City's argument that its good faith meeting competition defense was rejected by the trial and appellate courts merely because it used a price system. The following facts regarding Falls City's prices are not in dispute. Falls City charged higher prices to its Indiana distributors than to its distributors located in any other state (Tr. 965-966). Falls City's competitors also charged Indiana distributors generally higher prices than they charged to distributors in other states,[3] but unlike Falls City, they did not charge a

[3] Falls City asserts that each state developed a different distributor price structure due to laws preventing out-of-state distributors from selling to in-state retailers (Pet. at 3-4). This is a bare assertion that Falls City has made for the first time in its

(footnote continued on following page)

single state-wide price in Kentucky. Falls City never reduced its prices to Kentucky distributors. Instead, Falls City increased prices to both Vanco and the Kentucky distributors throughout the relevant period, with Falls City's prices to Vanco being increased more than Falls City's prices to its Kentucky distributors. The reason that Falls City's prices were higher to Vanco than to Vanco's Kentucky competitor was that Falls City "followed the leaders" in setting a high price in Indiana (Tr. 948). Indiana law prohibiting price discrimination requires that brewers charge the same price to all their Indiana distributors,[4] but it does not require that price be set at any particular level. Furthermore, Kentucky and most of the other states in which Falls City sold beer have no similar law.

In the context of these facts, it is apparent that the trial and appellate courts did not reject Falls City's defense merely because it used a price system. Instead, they found:

> There is nothing in the record to show that Falls City first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition. Indeed, Falls City's president testified that Falls City's Indiana price was set higher than its Kentucky price "because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned" (Tr.

Petition to this Court. Falls City introduced no evidence on this point. Falls City introduced no evidence that distributor prices throughout Indiana or any other state were generally at the same level. The exhibits referred to by Falls City merely show that there was a difference in prices between Vanco and its Kentucky competitor and that Falls City and its competitors charged more in Indiana than Kentucky. As Vanco's situation demonstrates, some Indiana distributors were in competition with out-of-state distributors and would have met their prices if they had been able to. The price discrimination made that impossible.

[4] Ind. Code Ann. § 7.1-5-5-7.

948). The district court therefore did not err in finding that Falls City had failed to meet its burden of showing that its discriminatory pricing was a good faith effort to defend against competitors. Cf. *A. E. Staley Manufacturing Co., supra.* (Pet. 10a.)

Falls City has not only ignored massive evidence presented by Vanco,[5] but has also minimized Vanco's hardships and exaggerated its own. The time period involved in this case is from July 1, 1972 to November 30, 1978. From 1956 until 1972, Vanco was the largest of all of Falls City's distributors, although it thereafter slipped to third place. Vanco was, according to Falls City, "excellent" and "the best beer distributor [of any brand] in Vanderburgh County" (PX 168-172, p. 3; Tr. 545-546). In 1972, Falls City beer accounted for 77.3% of Vanco's business. Falls City brands were Vanco's most important even through November of 1978 (PX 95; DX 25), by which time the combination of Falls City's price discrimination and Falls City's loss of market share due to increased competition from national brands had caused Vanco to acquire distribution rights for additional brands.

From 1972 through 1977, the volume of Falls City beer sold by Vanco declined by almost 60% (DX 5, 51). Vanco had net operating losses in four of the six years from 1972-1977, sustaining a net aggregate loss for the period of

[5] During a week-long trial, Vanco called eight live witnesses, introduced deposition testimony of five others, and introduced 232 exhibits. The witnesses testified about the existence of the relevant market and about consumer attraction to lower prices offered by the retailers of the favored distributors (Tr. 114-140, 219-231, 327-345, 546-566, 627-636). Falls City introduced three live witnesses and sixty-six exhibits. One witness was Falls City's president, one was an accountant called to rebut Vanco's expert witness, and one was Ronald Utley, the president of Vanco's Kentucky competitor, who admitted that consumers were attracted to his area due to low prices (Tr. 516-517).

$327,711 (PX 88). In contrast, Falls City's brewing business was profitable every year during 1972-1977 except 1975, with aggregate profits for the period, from its brewing operations alone, of $1,603,690 (DX 17). In 1979, Falls City sold its brands to G. Heileman Brewing Co. for $1,300,000, and sold its equipment for $2,300,000 for an aggregate of $3,600,000 (Tr. 980).[6] In January, 1978 Falls City acquired Middlewest Freightways, Inc. for $4,270,813 in cash (DX 23, n. 2 to Consolidated Financial Statements). Since it continues to operate this trucking business profitably, the defendant is hardly "'defunct," as it would have this Court believe.[7]

The Court of Appeals affirmed the district court's finding that the Robinson-Patman Act had been violated. However, it remanded the case for reassessment of damages because the District Court had used the "automatic damage" rule to measure damages. That rule was rejected by this Court in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 101 S.Ct. 1923 (1981), while this case was pending on appeal. In this regard the Court of Appeals stated:

> [A]s the district judge recognized, an antitrust plaintiff is not required to prove the exact amount of its

[6] At trial, Falls City's president admitted that it was the commercial failure of "Billy Beer," an unsuccessful new brand named for the brother of former President Jimmy Carter, that caused Falls City to leave the beer business (Tr. 919).

[7] Falls City was, and is, a financially healthy company. An examination of Falls City's Annual Reports (DX 21-23) shows that Falls City was accumulating cash and investing it in certificates of deposit, marketable securities and long-term investments. Thus, by the end of 1977 Falls City had "certificates of deposit," "securities purchased under agreement to resell," "marketable securities" (at "market") and "long-term investments" totalling $6,667,838 (DX 23, p. 2). In 1973 alone Falls City, on total "funds provided" of $1,816,457, increased its "long-term investments" by $956,841 (DX 21, p. 5).

damages. A reasonable approximation will suffice. *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* — U.S. at —, 101 S.Ct. at 1929; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266, 66 S.Ct. 574, 580, 90 L.Ed. 652; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129. Here, if Falls City had sold its beer to Vanco at the same price it charged Dawson Springs, Vanco could have retained the difference, and it therefore appeared reasonable for the district court to award Vanco the amount of the overcharges.[14]

Unlike the situation in *J. Truett Payne Co.* where the lower courts bypassed the issue of liability and did not find a violation of the Robinson-Patman Act (— U.S. at —, 101 S.Ct. at 1929), Judge Holder correctly found that Vanco "proved the facts of each of the essential legal elements of the [Robinson-Patman] action *** by a preponderance of the evidence" (defendant's App. A-28; see also A-29). Therefore, on remand, under *J. Truett Payne Co.* he must now assess plaintiff's damages by virtue of lost sales and profits.

[14] The district court's seeming reasonableness in assessing damages is underscored by the fact that it declined to award Vanco the $766,000 claimed as the loss of its going-concern value, which, on the basis of the court's findings, was attributable in part to Falls City's price discrimination. (Pet. 12a.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As indicated above, a fair view of the evidence reveals that this case presents no unsettled legal questions or issues upon which the circuit courts are in conflict or in need of guidance. Further, the Court of Appeals has been careful to remand this case for reassessment of damages in the light of this Court's recent ruling in *Truett Payne*. The only

dispute, therefore, is over whether the record supports the judgments of the trial and appellate courts. These are not proper questions to bring before this Court. In any event, as the foregoing and ensuing discussions reveal, the holdings of the district and circuit courts are amply supported by the evidence.

Competitive and Antitrust Injury

Vanco demonstrated that it lost substantial sales volume as a result of Falls City's price discrimination and that Vanco was forced in significant part to pass on its higher prices. Vanco also showed that in attempting to avoid a disastrous loss of volume, it absorbed such a portion of the discrimination that its operations became consistently unprofitable. This is clearly competitive and antitrust injury compensable under the Robinson-Patman Act and Section 4 of the Clayton Act. *Bargain Car Wash, Inc.* v. *Standard Oil Company (Indiana)*, 466 F.2d 1163 (7th Cir. 1972). Cases in which no competitive or antitrust injury were established are obviously inapposite to Vanco's situation. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 101 S.Ct. 1923 (1981);[8] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Falls City's main argument in the trial court was that Vanco could not have been injured by its price discrimination because Evansville, Indiana and Henderson, Kentucky did not constitute one retail market for beer. This is, in fact, the crucial issue in this case for if this area did not constitute a single relevant market, then Falls City's price discrimination could not have had the required anticompetitive effect. In this regard, the Court of Appeals' opinion states:

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[8] The defendant in *Truett Payne* noted, in Respondent's Brief on the Merits, at p. 8, n. 6, that Vanco had introduced the necessary proof of competition between Vanco and the favored purchaser that was allegedly absent in *Truett Payne*.

Falls City next argues that there is no unified Evansville-Henderson retail beer market and that the district court therefore erred in finding that Vanco and Dawson Springs, Falls City's Henderson County distributor, competed in the same market. However, the record is to the contrary insofar as their retail customers were concerned and that is sufficient under the Act.

As noted, Vanderburgh County, Indiana, and Henderson County, Kentucky, are separated for most of their common border only by the Ohio River. In addition, a portion of Henderson County lies on the Indiana side of the river contiguous to Evansville. The cities of Evansville and Henderson are diagonally across from each other on the river ten or fewer miles apart and are connected by a four-lane interstate highway. There is a massive flow of residents of Vanderburgh County to work in Henderson County and vice versa, and shopping centers and entertainment facilities in the area are patronized by residents of both counties. Consequently, the federal Department of Labor counts the two counties together for the purpose of labor statistics, and both areas are designated as one by the federal Department of Commerce. Moreover, many retail purveyors of beer and liquor are located along a Kentucky portion of the highway connecting Evansville and Henderson only a few miles from Evansville. This area, known as "The Strip," is frequented by both Indiana and Kentucky consumers. Finally, various witnesses testified that consumers in the area go to whichever county has the cheaper beer and liquor prices and that advertising is directed at residents of both areas as if they constituted one market. Thus the district court's finding that beer retailers in Vanderburgh County were in competition with those in Henderson County is not clearly erroneous.[9]

[9] We note also that Evansville-Henderson has previously been recognized as a single market for dairy products. See *Dean Milk Company* v. *Federal Trade Commission*, 395 F.2d 696, 698 (7th Cir. 1968). (Pet. 6a-7a.)

This ruling of the appellate court was based on massive evidence introduced by Vanco and, for that matter, by Falls City, that the area constituted a single market and that Vanco was seriously injured by purchasers shopping for cheap Kentucky beer. This evidence included maps, publications[9] and descriptions and pictures of "The Strip," an area on the four-lane highway just south of the Indiana boarder that was characterized by drive-through beer depots, one of which bore the colorful advice "First-Chance —Hot and Cold Beer to Go" for travelers south-bound from Indiana and "Last-Chance—Hot and Cold Beer to Go" for northerly traffic (PX 112; Supp.A-8). It is little wonder that such facilities existed, since retail prices on a case of 12-ounce cans of Falls City beer ranged from $.50 to $1.50

[9] Vanco introduced in evidence at trail the U. S. Government publication entitled *Standard Metropolitan Statistical Areas 1975* (Executive Office of the President, Office of Management and Budget) (PX 32) which set forth the following information on this relevant market:

FIPS-SMSA Code	Area Title and Definition	1970 Population
2440	**EVANSVILLE, IN-KY**	284,959
	Indiana portion	248,928
	Gibson County, IN	*30,441*
	Posey County, IN	*21,740*
	Vanderburgh County, IN (A)	*168,772*
	Evansville	138,764
	Warrick County, IN	*27,972*
	Kentucky portion	36,031
	Henderson County, KY	*36,031*
	Henderson	22,976

The Advertising Director of the major Evansville newspapers, Walter Fehn, stated in his deposition (which was noticed by Falls City) that Henderson was a suburb of Evansville and "part of our trading area" (PX 217, pp. 18-19).

lower in Kentucky than in Indiana (Tr. 223).[10] At one point, the Kentucky *retail* price of Falls City beer was actually lower than the Indiana *wholesale* price (Tr. 128, 231; PX 136; Supp.A-6). This retail price difference had an easily anticipated effect on the volume of Vanco's beer sales. As Falls City's own sales reports, written by Falls City's District Manager Mr. Jack Schnatter, admit:

> "Sales in the Henderson [Kentucky] market are also up the last months. *Some of this increase is due to the price increase in the Evansville [Indiana] area. . . .*" (Written February 15, 1974, emphasis supplied). (PX 160.)
>
> "[Vanco's] sales for the month of July are off over 9,000 cases from last year's sales. *Part of this decrease is due to the lower prices in the Kentucky markets. . . .*" (Written August 23, 1974, emphasis supplied). PX 12; Supp.A-3.)

Significantly, Falls City at trial did not call Mr. Schnatter as a witness in its defense, even though at that time he was still a Falls City employee. Mr. Schnatter was obviously the Falls City employee most knowledgeable about whether Evansville-Henderson was the proper relevant market and whether Falls City's higher prices to Vanco and lower prices to its favored Henderson distributor hurt Vanco.

Vanco also presented a great deal of other evidence that the Evansville-Henderson area constituted a single retail beer market and that consumers in this market living in both states shopped for the cheaper Kentucky beer, thereby reducing the volume of beer sales in Indiana. This evidence included physical descriptions of the relevant area, traffic

[10] That such price differences were persistent was corroborated by examples cited by five live witnesses and by contemporaneous newspaper articles (Tr. 121-122, 222-223, 327-345, 547-548, 630-634; PX 56 and 57).

flow patterns, expert witness testimony as to the boundaries of the market, advertising and trade practices,[11] and recorded observations of buying habits of beer customers.[12]

To bolster Vanco's evidence on the relevant market still further and to demonstrate that Vanco's decline in volume was not merely a reflection of Falls City's decline, Vanco introduced statistical evidence showing that the decrease in Vanco's sales of Falls City beer was approximately 15% greater than the decrease experienced by the average Indiana distributor of Falls City beer, and that the decrease in Falls City beer sales by Vanco's Kentucky competitor was 5.3% less than that of the average Kentucky distributor (DX 5, 12, 16, 51). In other words, while Vanco, previously Falls City's largest distributor among all of its distributors and by far Falls City's best distributor in Indiana, did worse than Falls City's average Indiana distributor, its Kentucky competitor did better than the average Kentucky distributor and considerably better than Vanco. A reasonable inference is that the differences in

[11] The advertising included advertising beer at low prices by Kentucky beer retailers. The advertising was done in a newspaper and over a radio station located in Evansville, Indiana. The ads were directed to a "Tri-State Area," which included Henderson County and Vanderburgh County. (Tr. 517; PX 215, pp. 17-18; PX 33, 134, 136; Supp.A-5-7).

[12] This evidence included testimony by a beer consumer who stated that he purchased beer in Kentucky because it was cheaper (Tr. 121-122), a beer retailer in Indiana who testified that he lost customers to Kentucky beer retailers due to low prices (Tr. 222), a Kentucky beer and liquor retailer who testified that he loses liquor customers to Indiana retailers when liquor prices are cheaper in Indiana (PX 215, p. 22), and the president of the favored purchaser who testified that Indiana and Kentucky residents purchased beer in Henderson County (Tr. 517).

these rates of decline were caused by Falls City's price discrimination.[13]

Falls City now suggests that the difference between Indiana and Kentucky retail prices and the consequent loss of volume to Vanco was caused not by the wholesale price difference, but by unrelated pricing decisions by Vanco and its retailers. Falls City has completely ignored evidence meticulously presented by Vanco.

Vanco proved the gross margin it required to remain profitable. It described its struggle to maintain this margin, which attempts were foiled by further discriminatory price increases by Falls City.[14]

Vanco also introduced evidence of pressure from its retailers to reduce Falls City prices because of the loss of volume the retailers were experiencing as a result of their own necessarily high prices.[15] In such circumstances,

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[13] Falls City's attempt to refute Vanco's showing of injury by identifying 13 counties—out of the 90 counties in Indiana—in which the rate of decline approached Vanco's is absurd, particularly where Falls City itself complained to Vanco that "our Falls City sales experience for the same period of time in the rest of [Indiana] is much better [than Vanco's]" (DX 1, p. 4). Moreover, the statistical evidence Falls City attacks was merely corroborative of powerful direct evidence.

[14] During the six years at issue in this case, Falls City raised its prices on a case of 12-ounce cans to Vanco five times for a total increase of $.84, but raised its prices to Vanco's Kentucky competitor only four times, for a total increase of $.69. In 1972 Vanco was already paying $.35 more for such a case than was its Kentucky competitor. By 1977 it was paying $.50 more. (DX 15; Supp.A-9.)

[15] An Indiana beer retailer testified that his price was higher than prices in Henderson because his costs were higher (Tr. 229). Indiana retailers complained to Vanco's president about their costs being too high to compete with Henderson retailers (DX 66, pp. 91-95).

it is absurd for Falls City to suggest that its price discrimination was not responsible for the difference in the retail prices for its beer in Indiana and Kentucky, or to complain that Vanco's prices to its retailers were higher than the prices of its Kentucky competitor. Of course they were—because of Falls City's price discrimination.

The following summary of the evidence by the Court of Appeals is a complete answer to Falls City's contentions that its decision was based on any presumption of injury or of the application of an automatic damage theory.

> The district court found that Vanco was injured in two ways over the relevant six-year period by Falls City's discriminatory pricing policy. First, it was forced to pass some of the price differential on to its customers in order to remain profitable and in turn suffered a loss in sales volume. Second, it was forced to absorb some of the price differential in order to stay competitive (that is, to keep its customers competitive) and thereby narrowed its profit margin. These factors demonstrate the requisite causal connection between the illegal price discrimination and the injury suffered. *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed. 2d 599. (Pet. 10a.)

Thus, the finding of fact of injury in this case, unlike the situation confronting this Court in *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* was unequivocal. Four Justices dissented from the judgment remanding the *Payne* case on the ground that the requisite injury had not been established:

> A plaintiff must show, to recover damages for violation of §2(a), that unlawful discrimination in price allowed a favored competitor to draw sales and profits from him, the unfavored competitor. 101 S.Ct. 1923, 1931 (1981).

That kind of showing is precisely what both the district and appellate courts held that Vanco had made successfully.

Falls City does not now attempt to refute Vanco's evidence, but merely complains that both the district court and the unanimous panel of the appellate court[16] "totally disregarded" and "totally ignored" certain evidence it had presented. In particular, Falls City complains that it was losing market share to national brands. However, Falls City stressed this fact both at trial and on appeal. It was discussed by both courts (Pet. 8a-9a, 33a-34a, 40a-41a). It was never disputed by Vanco, which carefully developed the extensive evidence discussed above of the effects of the discriminatory pricing to refute the argument that its loss of volume was merely a reflection of Falls City's decline. When Falls City complained to the Court of Appeals that the district court had "ignored" its evidence, the appellate court carefully reviewed the record and concluded:

> Vanco has carefully annotated those [district court] findings to 165 portions of the transcript of trial testimony and depositions as well as to exhibits of both parties (Supp. App. A-16—A-23). An examination of the annotated materials and the record generally has convinced us that the court's findings are not clearly erroneous and that the record supports its conclusion that Falls City violated Section 2(a). (Pet. 5a.)

There is no reason for this Court to review again the unanimous conclusions of the four judges who had before them the full record or live witnesses, or both, on the issue of whether Vanco established competitive and antitrust injury.

Meeting Competition Defense

The only other contention Falls City now makes in its effort to avoid Robinson-Patman Act liability is that its

[16] There was no dissent as to the finding that the price discrimination resulted in competitive and antitrust injury to Vanco.

prices were established in good faith to meet competition, within the meaning of § 2(b) of that Act. The burden of establishing the defense is on the defendant. As the use of the phrase "good faith" in the statute makes clear, this defense is peculiarly a matter of fact—of the *bona fide* beliefs and intentions of the defendant in establishing its prices. As this Court said in *Great Atlantic & Pacific Tea Co., Inc.* v. *Federal Trade Commission*, 440 U.S. 69, 82 (1979):

> The test for determining when a seller has a valid meeting-competition defense is whether a seller can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760.

Yet by Falls City's own admission, the reason for the price discrimination was its desire to obtain higher profits in Indiana, not to meet competition in Kentucky (Tr. 946, 948). After reviewing this and other evidence, both the trial and appellate courts concluded that Falls City had not sustained its burden that it was meeting competition in good faith.

Falls City argues that its § 2(b) good faith meeting competition defense was rejected on the allegedly erroneous basis that it used a pricing system as opposed to meeting competitive prices on a customer-by-customer basis. It alleges that other circuits allow use of pricing systems to establish the defense.

The question presented by Falls City is not raised by this case. The appellate court did not find the § 2(b) defense inapplicable when a pricing system was used. Instead, it

found that adoption of a competitor's discriminatory price system is not, by itself, sufficient to show good faith, and that Falls City did not in fact show good faith.

Adoption of a competitor's discriminatory pricing system has never been considered *prima facie* evidence of a good faith effort to meet the lower price of a competitor. There is good reason why. Leading economists[17] and lawyer-economists[18] state that persistent and systematic price discrimination cannot exist in a price competitive market, because competitive forces will cause the price differential to be equalized.[19] Persistent and systematic price discrimination is viewed as anticompetitive, and economists

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[17] F.M. Scherer, *Industrial Market Structure and Economic Performance*, 323-324 (2d. ed. 1980) (ch. 11, "Price Discrimination"). This Court has cited the first edition of Professor Scherer's text in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-457 (1978). Recently, Professor Scherer's testimony was extensively relied upon by the Sixth Circuit to reach its decision in *Marathon Oil Company* v. *Mobil Corporation*, Antitrust & Trade Reg. Rep. (BNA), Vol. 42 p. 43, Jan. 7, 1982 (6th Cir. 1982).

[18] Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, in Y. Brozen, ed. *The Competitive Economy*, 356 (1975); Robert H. Bork, *The Antitrust Paradox*, 388 (ch. 20, "Price Discrimination") (1978); II Phillip Areeda and Donald F. Turner, *Antitrust Law*, ¶ 514a, at 341-342 (1978).

[19] "Where there are rivals, no seller will be able to discriminate persistently, because his rivals will take away his disfavored customers (who pay a higher rate of return) with offers of slightly better prices. This process will continue until the rates of return to be had from selling to all customers are equal." Robert H. Bork, *supra*, note 18, 388. "Discrimination . . . cannot be systematically and persistently employed in a competitive market; competition will prevent sellers from extracting disproportionate returns in some transactions for long." Richard A. Posner, *supra*, note 18, 356.

and lawyer-economists consider it to be evidence of tacit or explicit collusion, or of market power.[20]

In contrast, sporadic or unsystematic price competition is viewed as procompetitive and evidence of genuine price competition. It undermines disciplined price uniformity among competitors by causing uncertainty about competitors' prices, thereby motivating price cuts to meet actual or feared price reductions by competitors. This results in the erosion of prices to lower levels.[21] This process, and the importance of maintaining an atmosphere of uncertainty to preserve competition, was recognized in *Great Atlantic & Pacific Tea Co., Inc.* v. *Federal Trade Commis-*

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[20] See notes 17 and 18, *supra*. See also Note, "Meeting Competition Under the Robinson-Patman Act," 90 Harvard Law Review 1476, 1482 n. 40 (1977), where the author states, relying upon Richard A. Posner, *The Robinson-Patman Act* 10-12 (1976), as follows: "Without some market discipline, a seller's discriminatory pricing scheme is susceptible to erosion by the undercutting of rivals; in addition, no single oligopolist can act alone to force competitors out of the market. Hence, successful maintenance of systematic discrimination often requires general adherence to a uniform discriminatory pricing pattern. Systematic discrimination thus is symptomatic of the more general problem of cartel pricing." This Note was cited in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 455, n. 30.

[21] "Another important procompetitive effect is the tendency of unsystematic price discrimination to undermine oligopolistic discipline. . . . In order to utilize capacity more fully, producers grant secret, discriminatory price concessions to a few aggressive buyers. Sooner or later the word leaks out, often through the efforts of buyers to extract similar concessions from additional suppliers, and others match or undercut the cuts. As the price concessions spread, list prices become increasingly unrealistic and eventually they are reduced, benefitting all buyers and not just the favored few. When secret price shading of this sort occurs frequently, sellers may lose all confidence in their rivals' willingness to cooperate toward a common price policy, and the resulting loss of discipline makes joint profit maximization impossible." F. M. Scherer, *supra* note 17, at 136. This analysis of Professor Scherer's was relied upon in *United States* v. *United States Gypsum Co.*, *supra*, at 456-457. *See also* Edward H. Cooper, "Price Discrimination Law and Economic

(footnote continued on following page)

sion, 440 U.S. 69, 81 (1979)[22] and in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-457 (1978). Conversely, mutual adoption of discriminatory price systems allows certainty about competitors' prices and discourages competitive price-cutting.

The § 2(b) defense is designed to allow firms to meet the genuine competition of sporadic price discrimination (*Great A&P Co.* v. *FTC, supra; United States* v. *United States Gypsum Co., supra*), but it does not sanction the adoption of anticompetitive discriminatory price systems. "The Act thus places emphasis on individual competitive situations rather than upon a general system of competition." *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1944).[23]

Staley held that adoption of a discriminatory basing point price system was not sufficient to establish the § 2(b) defense. *Staley* did not foreclose use of a price system. Instead, it looked to indicia of good faith to distinguish proper from improper adoption of prices. *Staley* asked whether the defendant had attempted to establish a nondiscriminatory price system from which prices were reduced to meet competition when necessary (*id.* at 754, 757). The defendant in *Staley* was found to have adopted its competitors' price system in order to take advantage of

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Efficiency," 75 Michigan Law Review 962-982, 968, and Richard A. Posner, *Antitrust Law, an Economic Perspective*, p. 63 (ch. 4, "Price Fixing and the Oligopoly Problem") (1976).

[22] "In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. . . . [D]isclosure [of prices] would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers." *Great A&P Co.* v. *FTC, supra*, p. 80.

[23] In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 451 (1978), this Court said: "In *FTC* v. *A. E. Staley Manufacturing Co.*, . . . the Court provided the first and the most complete explanation of the kind of showing a seller must make in order to satisfy the good-faith requirement of the § 2(b) defense."

artificially high prices in certain areas, not to meet the lower prices.

At trial, Falls City never showed the indicia of good faith discussed in *Staley*, and evidence shows that its adoption of its competitor's price system was clearly anticompetitive.[24] Falls City's competitors in Indiana and Kentucky were the same brewers, and they all priced higher in Indiana than Kentucky (Tr. 948-949; PX 30, pp. 23-24, 86, 106). Falls City has admitted its representatives obtained price information from representatives of other brewers and that it "followed the [prices of the] leaders" in Indiana (PX 219, p. 26).

In the trial of this case Judge Holder asked Mr. Tate, the president of Falls City the following question.

> The Court: "Well the price is f.o.b. and at your dock. Why is the Indiana price higher than Kentucky under the policy of your company?"
>
> Mr. Tate answered: "Well, because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned." (Tr. 948.)

On his direct examination by Falls City's own lawyer at trial Mr. Tate admitted that Falls City's lower Kentucky

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[24] Count I of Vanco's Complaint was an allegation that Falls City and its competitors conspired to fix prices and monopolize, in violation of § 1 of the Sherman Act, 15 USC § 1. On that count, the district court found that there was evidence of similar pricing practices by Falls City and other brewers; that Falls City sought the assistance of the United States Brewers Association, a trade association of which it and its competitors were members, to defend this suit; that Falls City and its competitors resisted proposed Indiana legislation aimed at ending brewers' higher prices in Indiana; and that other distributors in the relevant market benefited from Falls City's pricing policies, to the detriment of Vanco, beer retailers and beer consumers. The district court concluded, however, that the evidence was not sufficient to support a finding of a Sherman Act conspiracy to fix prices and to monopolize and dismissed Count I (Pet. 45a-46a).

prices were not established to "meet" the lower Kentucky prices of its competitors since Falls City was the only brewer which had a single price in Kentucky:

> "Q: Was [Falls City's Kentucky price] exactly equal to the prices of your competitors?
>
> A: No, it wasn't, couldn't have been, because they had all kinds of prices in the state of Kentucky, and we had one price in the state of Kentucky." (Tr. 948.)

Falls City's Indiana price was higher than in any other state where it sold beer (Tr. 965-966). Thus it was Falls City's high Indiana price that was abnormal, not its lower Kentucky price. Falls City never established a non-discriminatory price from which it lowered its Kentucky price, and never made any price reductions in Kentucky or Indiana. Instead, it steadily increased prices in both states, with increases in Indiana being larger and more frequent. (DX 15, Supp.A-9). Falls City and its competitors also, through the United States Brewers Association ("USBA"), resisted legislative and judicial attempts to eliminate the price differential.[25]

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[25] USBA is a trade association whose members produce 95% of the beer brewed in America (PX 30, p. 18). Falls City's president and chief executive officers of its competitors were on USBA's board of directors (PX 29). In 1973 Vanco's president asked Falls City to support a bill in the Indiana legislature to prohibit a brewer from charging a higher price to an Indiana distributor than to a distributor in a state bordering Indiana. Falls City refused to support the bill, the USBA lobbied against the bill, and the bill was defeated (Tr. 624-625, 769-771). Falls City's president and a USBA representative testified at a hearing on the bill. Afterwards, Falls City's president telephoned Vanco's president and told him not to disclose any Falls City prices, and to "keep his nose out of it." (Tr. 762-763). At a USBA meeting attended by chief executive officers of Falls City's competitors, Falls City requested aid in defending this lawsuit, and subsequently aid was given (PX 28, 29; PX 30, p. 93-108). According to Falls City's president, this was done because all brewers charged higher prices in Indiana than Kentucky or other states (PX 30, p. 93-108).

Further, there was no evidence of other commonly recognized indicia of good faith. No customers pressured Falls City to lower prices in Kentucky. There are no Falls City memoranda documenting any price cuts in Kentucky.

Based on all of the evidence, the district court found that Falls City had not met its burden to prove the good faith defense. That court further found that Falls City had increased its Indiana price for profit, and had not lowered prices to meet competition.[26] The appellate court affirmed.

The appellate court's opinion does not conflict with *Callaway Mills Co.* v. *FTC*, 363 F.2d. 435 (5th Cir. 1966). That case involved adoption of a volume discount system generally used in the industry, and the § 2(b) defense was allowed. However, the defendant showed that it first established a non-discriminatory price, that customers pressured it to meet competitive discounts, and that due to infinite variety in the product involved, adoption of volume discounts was the only feasible method of meeting its competitors' lower prices. The showing of good faith required in *Staley* was made in *Callaway* but is completely lacking in the present case.

Nor is the appellate court opinion in conflict with *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917 (9th Cir. 1981).[27] *Inglis* involved allegations of predatory primary line price discrimination and did not

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[26] In his dissent, Judge Swygert criticized this finding saying there was no benchmark to determine whether price discrepancies were caused by raising or lowering prices. But there is. At the beginning of the relevant period, Falls City was charging more in Indiana than Kentucky. During the relevant period, Falls City's price increases made the differential larger (DX 15; Supp.A-9).

[27] This opinion has been withdrawn from the bound volume of 652 F.2d for amendment and will be republished. As of the time this brief was printed, the opinion had not yet been republished.

involve a mutually adopted price system. In *Inglis*, there was very tough price competition. When the defendant heard that a competitor had offered a lower price to a customer, the defendant offered that same low price to all of its customers under the assumption that it would soon become the new market price. After a jury found that the defendant had not made out the meeting competition defense, judgment n.o.v. was entered. On appeal, the Ninth Circuit, emphasizing that "the touchstone must be the good faith and reasonableness of the defendant's belief," found that there was not sufficient evidence of good faith to justify the judgment no.v. and ordered a new trial.

Finally, Falls City has attempted to bolster its § 2(b) defense by blaming state laws for its high Indiana price. Falls City argues that an Indiana anti-price discrimination statute,[28] which effectively required Falls City to charge the same price to all distributors in Indiana, left it with an "impossible choice": to price below its competitors in Indiana or to raise prices to a non-competitive level in Kentucky (Pet. 12). As pointed out by the district court, no state law required that Falls City set its price at any particular level. It was not forced to adopt the discriminatory price system of its competitors, and it was certainly not required to charge the same price to all of its Kentucky distributors (Pet. 38a-39a). In *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), almost the identical argument was made about the interaction of the Robinson-Patman Act and a state anti-price discrimination statute. It was held that there was no conflict between the two statutes, and that both should be complied with (*id.* at 129-134).

Falls City further asserts that state statutes limiting out-of-state distributors from competing with in-state dis-

[28] Ind. Code Ann. § 7.1-5-5-7 (Burns 1978).

tributors have caused each state to develop a distinct distributor price structure, and that brewers simply price higher where distributors price higher (Pet., pp. 3-4). As previously indicated, no such evidence was introduced at trial, and Falls City raised this point for the first time in its Petition.[29] The evidence that is in the record tends to refute this assertion. As described above, Vanco was in competition with a Kentucky distributor and would have lowered its prices if it were able to do so and remain profitable. When Vanco did cut its prices, Falls City did not make a corresponding price cut. In any case, even if Falls City had followed distributor prices, rather than the prices of other brewers, that would not constitute meeting competition, because the 2(b) defense is available only if the defendant's lower prices are set to meet the lower prices of a competitor.

The trial and appellate courts were therefore correct in concluding that Falls City's action in taking advantage of its competitors' high prices in Indiana did not constitute good faith meeting of competition. By the very terms of the meeting competition defense, Section 2(b) of the Robinson-Patman Act, a *prima facie* price discriminator must justify his *lower price*.

State Tax Overcharge

Falls City's attempt to avoid a liability of approximately $17,000 for overcharging Vanco for Indiana excise tax would be ludicrous, except to the extent it illuminates the quality of the petition Falls City has brought to this Court. It is undisputed that over the years Falls City's invoices to Vanco showed, and Vanco paid, fractionally more excise tax than was required by the State of Indiana and than Falls City in fact remitted to Indiana. Falls City says that

[29] See ftn. 3.

Vanco should have relied on the informal price announcements it sent out, which aggregated the cost of the beer and the excise tax without itemizing them. However, one such price announcement gave notice of a 2¢ increase in price, and attributed that increase exclusively to an increase in the Indiana excise tax (PX 51; Supp.A-11). That increase was more than the increase in excise tax. After hearing the witnesses, the district court found Falls City's position "ridiculous" (Pet., 28a). After reviewing the record, the appellate court found the district court's judgment to be supported by the evidence (*id.*, 14a). It is clearly not a proper question for this Court.

CONCLUSION

For the foregoing reasons, Falls City's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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DATED: February 5, 1982.

Appendix

DEPARTMENTAL CORRESPONDENCE

DATE Aug 16, 1974

TO Mr Corbin Peter DEPT.

FROM Jack Schantz DEPT.

SUBJECT Weekly Report

This week I, worked the Henderson, Kentucky. market with our detailer Mr. Ron Utley. I, am very pleased to report that this market for the first seven months of this year is up in Sall City sales over 2,500 cases. I, realize that some of this increase is due to the higher prices in the Evansville, market, but I also think that Mr Utley has done an excellent job in his market. He has a very good relationship with all of his accounts.

This week, one of the larger package

DEPARTMENTAL CORRESPONDENCE

DATE Aug 16, 1924

TO Mr Emil Peter DEPT

FROM Jack Schnatter DEPT

SUBJECT Weekly Report

stores are featuring Fall City, Eagen Packs at a special price of $2.35. This is only one of the many specials and surprises that Mr Ully has arranged this summer.

Packs, are still number one. in this area with Fall City, a strong second and Bahnsen and Hawks, about even for third.

J H Schnatter

64SEABEE 64-E2397

PY-1 (PETER-11)

DEPARTMENTAL CORRESPONDENCE

DATE Aug 23, 1974

TO Mr. Cecil Oates DEPT.

FROM Jack Schnatter DEPT.

SUBJECT Weekly Sales Report

Sales for the month of July, are off over 9000, cases, from last years sales. Part of this decrease is due to the lower prices in the Kinston market and the fact accounts increased their inventories because of the latest price increase. Mr. LaRue also informed me that Pabst, sales for the same period were off about 13,000 cases.

Pabst is still number one with Falls City second Stirling third and Hauck fourth.

Jack Schnatter

P/X Ex 12

PX-1 (Rev. 12-72)

GARGARDY LI-C2207

DEPARTMENTAL CORRESPONDENCE

DATE Jan 25, 1975

TO Mr Emil Peter DEPT.

FROM Jack Schnatter DEPT.

SUBJECT Weekly Report

This past week I, worked with our distributor Mr Ron Utley, in the Henderson, Kentucky market, I am very glad to report that Falls City, were up over 2500 cases for the year 1974. Some of this increase is due to the higher prices in Indiana, but I will have to give Ron, and his fine sales force a lot of credit for the fine increase. They do an excellent job.

Robts, is still the number one seller in Henderson, with Falls City, Pecan and Buell and Stroh, are about even for third Place

PX-1 (PETER 3) P.H. EX. 3

Excerpts from Plaintiff's Exhibit 33—Advertisements of the House of Beverages, a Kentucky Beer Retailer, Read Over WIKY Radio, Evansville, Indiana During the Period December 8, 1976—December 31, 1976

"Holiday time . . . a great time to visit the tri-state's largest supermarket of beer, wine, other party goods. The House of Beverages! Over 5600 square feet make the House of Beverages the largest store of its kind in the tri-state. Three thousand square feet of wines, hundreds of different domestic and imported wines and champagnes. And through January 1st, Budweiser, a 6-pack of 12-ounce cans, $1.31. Also Michelob in the 6-pack, $1.60. For wines, beers and all party goods, visit the House of Beverages, Old Orchard Shopping Center, Highway 41, north of Henderson."

"The House of Beverages is bigger and better. The most complete store of its kind in the tri-state. More than just a handy place to pick up beers and wines, House of Beverages has a great selection of party supplies and goods, including gourmet foods and cheeses—many of which are featured at 10 per cent off to celebrate the holidays and their newly enlarged and remodeled store. Now's a good time to stock up on gifts of cheer for the season. The complete House of Beverages, Highway 41 north of Henderson in the Big "K" Shopping Center."

Advertisement of the Bridge Boat Club, a Kentucky Beer Retailer, Appearing in the Evansville Press, Evansville, Indiana, on August 10, 1974 and Introduced as Plaintiff's Exhibit 136 at Trial

BRIDGE BOAT CLUB

HWY. 41 S. UNDER NEW BRIDGE
PH: 423-8576
(CARRY OUT BEER) (CHEAPEST IN TRI-STATE)

SCHLITZ PREMIUM 24 12 Oz. Cans $5.35 (Tax Incl.)
STERLING..... 24 12 Oz. Cans $4.65 (Tax Incl.)
PABST BLUE RIBBON..... 24 16 Oz. Cans $5.80 (Tax Incl.)
BUSCH, FALLS CITY, PABST, FALSTAFF.
STROHS..... 24 12 Oz. Cans for $4.90 (Tax Incl.)
MILLER'S, HAMMS, BUDWEISER..... 24 12 Oz. Cans $5.60 (Tax Incl.)
MILLER'S (PONY-PAK) 8, 7 oz. Bottles $1.15

WE DO NOT SELL TO LIQUOR STORES OR TAVERN OWNERS!

MON.-THURS. 8-11
FRI.-SAT. 8-12
Closed SUN

EVANSVILLE PRESS
AUGUST 10, 1974
Page 3

Pl. Ex. 136

PX-114

Advertisement of the Bridge Boat Club, a Kentucky Beer Retailer Appearing in the Evansville Press, Evansville, Indiana on August 24, 1974 and Introduced as Plaintiff's Exhibit 134 at Trial

EVANSVILLE COURIER
AUGUST 24, 1974
Page 2

Pl. Ex. 134

PX-118

BEER

Defendant's Trial Exhibit 15

FC-I-I
SOURCE: FC-I-H

ANALYSIS OF FALLS CITY AND DRUMMOND BROS. PREFERRED PRICE DIFFERENTIAL IN INDIANA VERSUS KENTUCKY, 1971-1977

Year	F.O.B. Price Differential			Withdrawals of Falls City and Drummond Bros. Preferred	
	Indiana	Kentucky	Difference	Cases	Decrease from Prior Year
1971				363,811	
Exp. 24/12	2.50	2.12	.38		
NR 24/12.....	3.16	2.81	.35		
24/12 6-pk tray ... (cans)	3.38	3.01	.37		
1972				351,498	(12,313)
No Change					
1973				269,430	(82,068)
No Change Until:					
12/13/73					
Exp. 24/12	2.74	2.12	.62		
NR 24/12	3.40	2.81	.61		
24/12 6-pk tray ... (cans)	3.55	3.01	.54		
1974				240,051	(29,379)
No Change Until:					
7/5/74					
Exp. 24/12	3.10	2.45	.65		
NR 24/12	3.75	3.15	.60		
24/12 6-pk tray ... (cans)	3.90	3.35	.55		
12/30/74					
Exp. 24/12	3.10	2.60	.50		
NR 24/12	3.81	3.30	.51		
24/12 6-pk tray ... (cans)	4.12	3.50	.52		
1975				197,162	(42,889)
No Change					

[*Continued*]

Year	F.O.B. Price Differential			Withdrawals of Falls City and Drummond Bros. Preferred	
	Indiana	Kentucky	Difference	Cases	Decrease from Prior Year
1976				165,513	(31,649)
1/2/76					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	3.93	3.42	.51		
24/12 6-pk tray ... (cans)	4.12	3.62	.50		
1977				143,683	(21,830)
No Change Until:					
2/1/77					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	3.93	3.42	.51		
24/12 6-pk tray ... (cans)	4.22	3.72	.50		
4/25/77					
Exp. 24/12	3.20	2.90	.30		
NR 24/12	4.00	3.50	.50		
24/12 6-pk tray ... (cans)	4.22	3.72	.50		

Excerpt from Plaintiff's Trial Exhibit 51, Price Announcement of Falls City Brewing Co. Dated September 28, 1973 Directed to Indiana Distributors

"All of you are aware of the increase in the tax imposed on beer by the State of Indiana that becomes effective October 1, 1973. Due to this increase, the price of our products, Falls City Beer and Drummond Bros. Preferred Beer, will be increased on this same date, October 1, 1973, as follows:

All cases of 24-12 oz.	$0.02
All cases of 12-32 oz.	$0.02
All Half Barrels	$0.12
All Quarter Barrels	$0.06

This increase in price covers only the increased Indiana State Tax and in no way reflects the cumulative increases in the cost of material, supplies, labor, etc., that have been absorbed up to this date."

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS

No. 81-1271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,
Petitioner,
v.
VANCO BEVERAGE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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15 U.S.C. § 13(b)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1271

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

INTRODUCTION

The two government agencies directly charged with enforcement of the antitrust laws have urged review of the "unduly narrow" and anticompetitive decision below.[1] (Amicus Brief at 16). In supporting the Petition, the Department of Justice and the Federal Trade Commission stress the importance of "properly interpreting the meeting-competition defense" and resolving the "unsettled state of the law in the lower federal courts" on the application of Section 2(b). (*Id.*) Nothing in Vanco's Opposition detracts from the position taken by Petitioner and amici. A brief reply is necessary, however, to rebut certain of the more significant misstatements in that Opposition.

[1] Hereinafter, the Brief in Opposition will be cited as "Opp.," and the Brief for the United States as Amicus Curiae as "Amicus Brief."

ARGUMENT

1. Vanco's meeting competition argument rests on two basic fallacies. First, Vanco asserts that Falls City cannot sustain its burden of proving good faith under *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), because it did not adopt customer-by-customer price responses. Second, Vanco claims that Section 2(b) can be invoked only when a price disparity is the result of a price reduction. (Opp. at 22-25). As the Department of Justice and Federal Trade Commission aptly note, however, "[n]either proposition . . . is correctly drawn from this Court's decision in *Staley*." (Amicus Brief at 13).

On the issue of area-wide pricing, Vanco attempts to impugn Falls City's good faith by claiming that Falls City "was the only brewer which had a single price in Kentucky." (Opp. at 23). This is patently false. Not only Falls City, but also leading brewers such as Miller Brewing Company and the Stroh Brewery Company, sold at a single price to all Kentucky distributors. (DX 28). Significantly, none of Falls City's competitors priced their beer to Kentucky wholesalers on a customer-by-customer basis. (DX 28). And none of Falls City's competitors charged different prices to their customers within Henderson County. (DX 28). Most importantly, Falls City's Kentucky prices closely approximated those of its leading competitors,[2] and Vanco does not even purport to challenge this fundamental fact. (DX 28).

As the government amici note, the "better reasoned decisions of the Fifth and Ninth Circuits" uphold "area

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[2] As purported evidence of Falls City's lack of good faith, Vanco cites the "admiss[ion]" of Falls City's President that Falls City's Kentucky price did not precisely match the prices of each of its competitors. (Opp. at 22-23). In fact that testimony simply demonstrates that Falls City could not possibly have met each competitor's price since its competitors' prices were not identical in Henderson County. Falls City did, however, set a price that met the general range of its competitors' prices there. (Tr. 948).

price systems as legitimate means of meeting competition under Section 2(b)." (Amicus Brief at 7). The use of an area-wide price is a "particularly reasonable response" by a small firm, since the "administrative costs of price negotiations with individual customers may impose a greater burden on smaller firms than on their larger rivals." (*Id.* at 12 n.13). Falls City's pricing system was an entirely reasonable method of meeting the general range of its competitors' prices in Kentucky, and a rejection of that pricing system would be contrary to the pragmatic interpretation of Section 2(b) mandated by this Court in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and inconsistent with the broader competition goals of the antitrust laws. (*See* Amicus Brief at 15-16).

With respect to the sequence of Falls City's price movements, Vanco clings to the illogical distinction between having to reduce a price in order to meet competition and being unable to increase the price for the same reason. (Opp. at 22-23). But the economic effect is the same "[w]hether the market Falls City faced was one in which its competitors first raised the prices charged to wholesalers in Indiana, or one in which its competitors first lowered the prices charged to wholesalers in Kentucky." (Amicus Brief at 15). In either case, Falls City "would be powerless to charge Kentucky wholesalers more for its beer than its competitors were charging those wholesalers," and the "timing and direction (up or down) of the seller's pricing decisions are not material." (*Id.*; *see* Swygert dissent, App. 16a).

The critical fact in determining whether a firm qualifies for the Section 2(b) defense "is not whether its price was 'raised' or 'lowered,' but whether the price differential in question results from the seller's reasonable and good faith effort to respond to the forces of competition."

(Amicus Brief at 15; *see* App. 16a-17a). That showing unquestionably was made here, and review is essential to make clear, as the Fifth and Ninth Circuits have held, that Section 2(b) protects sellers who reasonably believe they are meeting competition by adopting an area-wide pricing system. (*See* Amicus Brief at 7).

2. The Petition urged this Court to re-examine the much-criticized competitive injury rule of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Vanco makes no effort to defend the appropriateness of the *Morton Salt* rule, particularly as applied in a case where, as here, there is no evidence of seller predation or systematic preference of large buyers. Indeed, Vanco does not discuss *Morton Salt* at any point in its brief. Instead, it simply marshals a set of "facts" that it claims supports the Seventh Circuit's conclusory findings of competitive and business injury.

First, Vanco's presentation overlooks undisputed evidence that both negates any inference of competitive injury and explains Vanco's decline in Falls City sales. Thus, Vanco ignores crucial evidence that (1) the major brands of beer experienced massive sales gains in Evansville although they were subject to the same price differential as Falls City;[3] and (2) Falls City's sales in Indianapolis, Muncie and other central Indiana markets declined at the same rate as in Evansville, although clearly not affected by the price differential.[4]

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[3] From 1972 to 1977, Miller's Evansville sales increased by nearly 520 percent, Stroh's by more than 150 percent, and Anheuser-Busch's by approximately 70 percent. (DX 10, App. 57a).

[4] Vanco clearly misrepresents the record when it states that Falls City's President "admitted that it was the commercial failure of 'Billy Beer' . . . that caused Falls City to leave the beer business." (Opp. at 8 n.6). In fact, Mr. Tate testified that in 1978, sales of Billy Beer declined, but also "business in general went down and our board of directors made the decision to close the brewery; we could no longer be competitive." (Tr. 919).

Second, Vanco attempts to portray itself as a victim of Falls City's price discrimination, which it claims caused it to lose Falls City sales and led it "to acquire distribution rights for additional brands." (Opp. at 7). The fact is that in 1972, Vanco was a pre-eminent Falls City distributor, while in 1973, with the price differential precisely the same as in the previous year, Vanco suffered its steepest Falls City sales decline. (DX 1, CA App. 47; PX 95). Significantly, it was in 1973, not 1978 as Vanco implies, that Vanco increased its emphasis on other brands by adding Anheuser-Busch's Busch Bavarian brand.[5]

Third, Vanco claims it was injured because it was "in competition with a Kentucky distributor and would have lowered its prices if it were able to do so and remain profitable." (Opp. at 26). Yet there was no evidence that Vanco or any other Evansville distributor set prices in response to price movements in Henderson, Kentucky. To the contrary, Vanco admitted that its prices were solely "dependent on the competition" from Evansville distributors of other beers. (DX 66 at 85-87, CA App. 88-90).

The failure by the Seventh Circuit and Vanco to deal with these critical cat al factors illustrates the pernicious result of mechanical application of the *Morton Salt* rule in a setting so far removed from the facts of *Morton Salt* and the competitive evils that prompted enactment of the Robinson-Patman Act.

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[5] In 1973, Vanco's Anheuser-Busch sales increased by a dramatic 124 percent over the previous year, more than offsetting Vanco's decline in Falls City sales, although the Anheuser-Busch brand also was subject to the Indiana-Kentucky price differential. (PX 95).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant the Petition.

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v.

VANCO BEVERAGE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, as a matter of law, Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b), forecloses a seller from justifying an area pricing system adopted to meet the prices of its competitors.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Robinson-Patman Act is not construed in a manner that interferes unnecessarily with the primary objective of the antitrust laws—protection of the nation's competitive economic system. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978). The Federal Trade Commission, which has developed much of the Act's jurisprudence in administrative proceedings, shares this interest.

STATEMENT

1. Petitioner Falls City Industries, Inc. operated a brewery in Louisville, Kentucky[1] and sold beer f.o.b. its plant to wholesalers in Indiana, Kentucky, and other states. Respondent Vanco Beverage, Inc. was the wholesale distributor of Falls City beer in Evansville, Indiana, a town located near the Kentucky border. Vanco did not compete directly with any of Falls City's Kentucky wholesalers because the law in each state permitted wholesalers to sell only to in-state retailers.[2] Vanco alleged, however, that beer retailers in Henderson County, Kentucky competed with its retailer customers (Pet. App. 1a-2a). For a period of about six years, Falls City sold its beer to Kentucky wholesalers at prices lower than those charged to Vanco and other wholesalers in Indiana (Pet. App. 59a-60a). In so doing, Falls City followed the prices of larger brewers who sold beer in Kentucky and Indiana (Tr. 935).[3]

Vanco sued Falls City in the United States District Court for the Southern District of Indiana, alleging that Falls City had violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), by discriminating in price between Vanco and wholesalers in Kentucky, including Dawson Springs, Inc., a distributor doing business in Henderson County.[4] Vanco claimed that

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[1] After this suit was commenced, Falls City discontinued its brewery operation (Pet. App. 26a).

[2] See Ind. Code Ann. § 7.1-3-3-5 (Burns Cum. Supp. 1981); Ky. Rev. Stat. § 243.180 (repl. 1981). Indiana law also requires brewers to sell to all Indiana wholesalers at the same price. Ind. Code Ann. § 7.1-5-5-7 (Burns 1978).

[3] "Tr." refers to the transcript of the trial in the district court.

[4] Vanco also alleged that Falls City had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and had overcharged Vanco for state excise taxes.

the difference in wholesale prices affected retail prices and ultimately caused Vanco to sell less Falls City beer through Indiana retailers. Vanco sought treble damages and injunctive relief. Falls City admitted that it charged lower prices in Kentucky than in Indiana, but contended that: (1) Vanco had failed to show the injury to competition required to establish a *prima facie* case under Section 2(a); (2) Falls City had a complete defense under Section 2(b) of the Act, 15 U.S.C. 13(b), because its lower Kentucky prices were necessary to meet competition; and (3) Vanco had failed to prove damages under Section 4 of the Clayton Act, 15 U.S.C. 15 (see Pet. App. 7a-12a).

2. The district court found that Vanco had proven all the elements of a *prima facie* case of price discrimination under the Robinson-Patman Act. It defined the relevant retail market as Henderson County, Kentucky, and three counties in Indiana surrounding and adjacent to Evansville (Pet. App. 28a). The district court found that, during the six-year period in question, Falls City had charged Vanco prices ranging from 10% to 30% higher than those charged Dawson Springs and other Kentucky wholesalers, and that Vanco had passed some of the difference on to its retailers. As a consequence, Kentucky retail prices were lower, consumers preferred Kentucky retailers, and Vanco's sales of Falls City beer to its retailers in Indiana declined (Pet. App. 30a-37a). The district court also found that Falls City had failed to establish a Section 2(b) meeting-competition defense because (Pet. App. 37a):

> Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant's pricing policy was to have a uniform price in each of the thirteen

> States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers [because] the Kentucky competitors had all kinds of prices.

The district court found that the aggregate amount of overcharges to Vanco was $575,293.79. Applying a rule of "automatic damages," the court entered judgment for treble that amount (Pet. App. 52a).[5]

3. A divided panel of the court of appeals affirmed the determination of liability and remanded for redetermination of damages in light of this Court's decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, No. 79-1944 (May 18, 1981). The majority concluded that Vanco had proven injury to competition because it had shown that the Indiana/Kentucky price differential was great enough to influence retail prices, and that the differential had the potential to curtail purchases by retailers from Vanco (Pet. App. 7a-9a). The court also held that Falls City was not entitled to assert a meeting-competition defense because it had not shown that it "first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition" (Pet. App. 10a). Rather, in adopting a higher price in Indiana, Falls City "was simply taking advantage of its competitors' policies of charging higher prices in Indiana than in Kentucky and other states" (Pet. App. 10a). The court of appeals construed this Court's decision in *FTC* v. *A.E. Staley*

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[5] The Court also awarded Vanco damages on its pendent state law claim. Vanco's Sherman Act claim was dismissed. Injunctive relief was found to be unnecessary because Falls City had ceased brewing beer before the case was decided.

Manufacturing Co., 324 U.S. 746 (1945), to mean that the Section 2(b) meeting-competition defense is not available to a seller that adopts area pricing as a response to competitive market conditions (Pet. App. 9a-10a). Because the trial court had erroneously adopted an "automatic damages" rule, however, the court of appeals remanded for a determination of lost sales and profits (Pet. App. 12a, 14a).

Judge Swygert dissented. He concluded that, "as a matter of law," Falls City had established a meeting-competition defense (Pet. App. 15a). Judge Swygert agreed with the Fifth Circuit's decision in *Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 441 (1966), which held that "the adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition" (Pet. App. 17a). Judge Swygert also concluded that *FTC* v. *A.E. Staley Manufacturing Co.* was consistent with that proposition. What *Staley* forbade was not the adoption of an area-wide price, but adherence to an illegal pricing system which the seller and its competitors had adopted through collusion. Moreover, he found it immaterial that Falls City's Indiana/Kentucky price differential was the result of general competitive conditions rather than an identifiable instance of "lowered" prices in Kentucky. Judge Swygert emphasized that the broad purpose of Section 2(b) is to allow firms to avoid losing business to competitors that offer lower prices, a purpose that would be served by allowing Falls City to invoke Section 2(b) here (Pet. App. 16a).[6]

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[6] Falls City's petition for rehearing and rehearing en banc was denied. Three of the Seventh Circuit's six active judges voted for rehearing en banc (Pet. 2 n.2).

DISCUSSION

This case presents an important question under the Robinson-Patman Act: whether the meeting-competition defense prescribed in Section 2(b) of the Act is ever available to sellers who respond to market forces by adopting different price systems, rather than by adjusting their prices solely on a customer-by-customer basis. The question usually arises in two different contexts. First, a seller may adopt an area price system, offering a uniform lower price throughout a particular local market. Second, a seller may adopt a discount system which produces different prices within a particular market, according to sales volume or the need for promotion. The courts of appeals are divided on the availability of the Section 2(b) defense for both kinds of price systems.[7]

In this case, Falls City adopted different area price levels for beer sales in Indiana and Kentucky, each of which, by operation of state law, was a separate wholesale market.[8] This system was challenged by an Indiana wholesaler, Vanco, which was indirectly injured because consumers served by its retailer customers crossed the border to buy beer at lower retail prices in Kentucky (see Pet. App. 6a-7a). Falls

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[7] On the availability of the meeting-competition defense for area price systems, compare *Falls City* with *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956). On the availability of the defense for discount price systems, compare *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674, 677 (2d Cir.), cert. denied, 361 U.S. 826 (1959), with *Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 441-442 (5th Cir. 1966), and *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917, 950 (9th Cir. 1981). These cases are discussed on pages 7-9, *infra*.

[8] See note 2 *supra*.

City sought to justify the lower wholesale prices it charged its Kentucky distributors on the ground that it was simply meeting the level of prices charged in that market by its major competitors. The court of appeals held, however, that as a matter of law, an area pricing system like Falls City's can never qualify for the defense prescribed in Section 2(b). This conclusion forecloses any inquiry into market conditions to determine whether differing area price systems are a reasonable means of meeting competition in the commercial context of a particular seller's operations.

The Seventh Circuit's decision conflicts with decisions of the Fifth and Ninth Circuits upholding the use of [redacted] price systems. It also is inconsistent in principle with recent decisions of this Court holding that Section 2(b) protects sellers who reasonably believe they are meeting competition. As this Court has emphasized, a flexible construction of the meeting-competition defense is needed to serve the "broader policies of the antitrust laws." *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978). Cf. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74 (1953). Review by this Court accordingly is warranted.

1. The Seventh Circuit's decision conflicts with better reasoned decisions of the Fifth and Ninth Circuits upholding both discount and area price systems as legitimate means of meeting competition under Section 2(b).

In *Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 441 (1966), the Fifth Circuit held that "there is nothing wrong *per se* with *adopting* a 'pricing system' used by competitors." It concluded that the Section 2(b) defense was available to a seller who had

charged different prices within the same market in order to match its rivals' systems of quantity discounts. A seller is not required by the Act, the court observed, to lower its prices "in a wholly piecemeal fashion." 362 F.2d at 441. Rather, a pricing system is to be condemned only when it is not a reasonable method of meeting a competitor's prices, and reasonableness must be determined by considering industry conditions on a case-by-case basis.[9]

Similarly, the Ninth Circuit in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917 (1981), held that the meeting-competition defense could be asserted by a seller that reduced its price for private label bread throughout northern California in response to a competitor's offer to a particular customer. The court emphasized that "[m]arketwide price reductions are permissible when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market." *Id.* at 950.[10]

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[9] In *Surprise Brassiere Co.* v. *FTC*, 406 F.2d 711 (1969), the Fifth Circuit applied the *Callaway* standard but held that a Section 2(b) defense was not available to a firm that had offered marketwide preferential advertising allowances to its larger customers. In contrast to *Callaway*, the seller in *Surprise Brassiere* "was not confronted with the problem of trying to match its prices with the prices of competitors that varied according to the cumulative annual purchases of each customer. It was faced with specific competitive situations but its proof did not show that it limited its variances to specific competitive situations." 406 F.2d at 715.

[10] The seller in *Inglis* "operated on the assumption that once a new price became available to one buyer, it would quickly * * * become available to all buyers in the market. This assumption was shared by other competitors, and was supported by experience." 652 F.2d at 950. Falls City oper-

Likewise, in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (1955), cert. denied, 350 U.S. 991 (1956), the Ninth Circuit upheld an area price structure against a claim by competing sellers that it "did not meet 'individual competitive situations,' but blanketed a local area with a market-wide price cut * * *." *Id.* at 361. The court held that such a price system was a permissible response to numerous and varied price reductions within the Los Angeles area by the seller's competitors. *Id.* at 366.

By contrast, the Second Circuit apparently follows the rule applied by the Seventh Circuit here. In *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959), it held that a seller of auto parts could not charge different prices within the same market by offering volume discounts, regardless of its competitors' practices. The court reasoned that a "lowered price is within § 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system." *Id.* at 677.[11]

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ated on more than an assumption supported by experience. Price information seems to have been freely available, and Falls City's competitors charged uniform prices throughout Henderson County, Kentucky (see Pet. App. 62a-63a; Defendant's Trial Exhibit 28).

[11] Other court decisions reflect confusion as to the proper application of the meeting-competition defense when lower prices are offered to a broad class of customers. See, *e.g.*, *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 725-726 (5th Cir. 1975) (Section 2(b) defense is available when system of prices is matched); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F.2d 492, 493 (D.C. Cir. 1965), cert. denied, 384 U.S. 959 (1966) ("a plan to combat other plans is not an effective defense under the proviso in Sec-

2. The Seventh Circuit's holding in this case cannot be reconciled with the interpretation which this Court has given to Section 2(b) of the Robinson-Patman Act.

a. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 452 (1978), this Court rejected the contention that "direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2(b) defense." It emphasized that the key to the meeting-competition defense is the seller's good faith effort to maintain sales in

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tion 2(b)"; individual responses are required); *Forster Manufacturing Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964) (Section 2(b) defense is available for an area-wide price cut made to meet a competitor's offer); *Ludwig* v. *American Greetings Corp.*, 282 F.2d 917 (6th Cir. 1960) (Section 2(b) defense is available for an area-wide practice of giving free display cabinets to meet a competitor's policy); *Ingram* v. *Phillips Petroleum Co.*, 259 F. Supp. 176, 183-184 (D. N. M. 1966) (response of adopting an industry pricing system is not the "genuine response to an individual competitive demand" required by Section 2(b)).

The Department of Justice previously has announced its agreement with the *Callaway* rule, which allows a seller to meet competition by adopting a pricing system. See *Department of Justice Report on the Robinson-Patman Act* 24-25, 99-100, 265 (1977). The Report notes that on this question "[t]here is a split authority among the various circuits." *Id.* at 24. The *Callaway* rule also has been endorsed by a recent report of the American Bar Association's Section of Antitrust Law and several leading commentators. ABA Section of Antitrust Law, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Vol. 1, at 126-128 (1980). See R. Posner, *The Robinson-Patman Act* 42-43 (1976); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 9.7 (1962). Rowe emphasizes that "[t]he issue of pricing 'systems' still awaits careful analysis and harmonization by the Supreme Court * * *." *Id.* at 233.

the face of pressure from competitive prices.[12] After its decision in *United States Gypsum Co.*, this Court reemphasized that "[t]he test for determining when a seller has a valid meeting-competition defense is whether a seller can 'show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 82 (1979), quoting *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746, 759-760 (1945). If a seller makes this showing, it has a complete defense to a charge of price discrimination. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

Although Section 2(b) is worded in the singular (a seller's "lower price" must be offered in a good faith attempt to meet "an equally low price of a competitor"), nothing in the statute or the policy underlying the defense forbids its application to a pricing system. When a seller's competitors offer a range of prices to a large group of customers, a uniform price within that range is a reasonable way for the seller to meet competition. A contrary interpretation would mean that the price to each customer would have to be negotiated individually after consideration of evidence about what each competitor was

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[12] To illustrate how that criterion might be satisfied, the Court cited *International Air Industries, Inc.* v. *American Excelsior Co.*, *supra*, 517 F.2d at 725-726. That case approved the use of a discount pricing system, and in the portion of the opinion cited by this Court the Fifth Circuit stated: "In order to avail itself of this defense, [the defendant] need only have shown that its pricing system was a reasonable method of meeting [its competitor's] lower price. *Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 442 (5th Cir. 1966)."

offering to each particular buyer. Such cumbersome and impractical procedures are not demanded by the good faith requirement of Section 2(b), which, as this Court has observed, embodies " 'a flexible and pragmatic, not technical or doctrinaire, concept.' " *United States Gypsum Co., supra,* 438 U.S. at 454, quoting *Continental Baking Co.,* 63 F.T.C. 2071, 2163 (1963).[13]

b. The court of appeals mistakenly believed that its decision was required by the holding of this Court in *FTC* v. *A.E. Staley Manufacturing Co.,* 324 U.S. 746 (1945). Like this case, *Staley* involved an area price structure. In *Staley,* however, the issue was whether the Section 2(b) defense was available to a seller which had adopted a delivered price system using a basing point that disregarded actual freight costs. The seller contended that it was simply responding to the basing-point system adopted by its competitors. That system, however, had been held to be unlawful in *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945). This court held that Section 2(b) did not permit "a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system

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[13] The use of an area-wide response to a range of competitors' prices would appear to be a particularly reasonable response by a small firm such as Falls City, which competed against larger firms. The administrative costs of price negotiations with individual customers may impose a greater burden on smaller firms than on their larger rivals. An interpretation of the meeting-competition defense which disadvantages smaller competitors would be contrary to the Robinson-Patman Act's goal of affording some measure of protection to smaller competitors.

maintained by his competitors." *Staley, supra*, 324 U.S. at 753.[14]

Despite the decisive difference between *Staley* and the present case, the district court and court of appeals culled from *Staley* two general propositions: (i) that the Section 2(b) defense is restricted to ad hoc responses to the actions of competitors, and does not apply to systematic responses (Pet. App. 9a-10a, 37a, 49a); and (ii) that the defense may be invoked only by sellers whose price disparity is the result of a price reduction, not a price increase (Pet. App. 9a-10a, 38a, 49a). Neither proposition, however, is correctly drawn from this Court's decision in *Staley*.

Staley did not condemn systematic price differences *per se*. It did say that Section 2(b) "places emphasis on individual competitive situations, rather than upon a general system of competition." 324 U.S. at 753. But the Court was there responding to the seller's claim that it was justified in charging "phantom freight" to nearby buyers simply because it absorbed freight costs for distant buyers. The Court rejected the view that the system "as a whole" constituted a good faith attempt to compete when Staley's system-wide policy caused it to refrain from competing in areas where it enjoyed a cost advantage. Falls City's price system, by contrast, was competitive in both Kentucky and Indiana (Pet. 3-6; Pet. App. 15a-17a).

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[14] The sellers in *Staley* and *Corn Products* apparently were adhering to an arrangement to divide available business among the members of a cartel. See R. Posner & F. Easterbrook, *Antitrust* 345-346 (2d ed. 1981); F. Rowe, *supra* note 11, at 221-222. See also *Callaway Mills Co.*, 64 F.T.C. 732, 750 n.3 (1964) (dissenting opinion). The FTC issued orders against both Staley and Corn Products based on uncontested charges that the basing-point system constituted a price-fixing conspiracy. *Corn Products Refining Co.*, 47 F.T.C. 587 (1950).

Falls City simply attempted to maximize its profits on sales to wholesalers in Indiana by matching its competitors' prices there, and was forced by competition to sell more cheaply in Kentucky. In these circumstances, it is irrelevant that the lower Kentucky price was offered state-wide. It is not contended that Falls City sold to any Kentucky buyer at a price lower than those offered by all its competitors. Thus, even if a court were to view the lower Kentucky price on a customer-by-customer basis, it is still clear that Falls City's "lower price * * * was made in good faith to meet an equally low price of a competitor." 15 U.S.C. 13(b).

Nor does anything in *Staley* or in the language of Section 2(b) limit the meeting-competition defense to cases where a seller's lower price is the result of a price reduction. The court of appeals laid great stress on one sentence in the *Staley* opinion that said: "Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition." 324 U.S. at 754-755. The court of appeals then concluded that Falls City was not "meeting competition" because the price difference arose, not because Falls City had lowered its price in Kentucky, but because it had raised its price in Indiana (Pet. App. 10a; see also *id.* at 38a, 49a). The error that the court of appeals made was to read a descriptive reference in *Staley* as an additional prerequisite for invoking the meeting-competition defense.[15] The point the Court was making in the quoted passage from *Staley* was that, from its inception, Staley's behavior

[15] "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979).

had been the very antithesis of competitive pricing. Rather than trying to meet competition with lower prices, it had charged nearby buyers "artificially high prices," 324 U.S. at 756, and thereby had given other sellers a share of that market.

Whether the market Falls City faced was one in which its competitors first raised the prices charged to wholesalers in Indiana, or one in which its competitors first lowered the prices charged to wholesalers in Kentucky, the economic effects are identical for both Falls City and Vanco. In either case, Falls City would be powerless to charge Kentucky wholesalers more for its beer than its competitors were charging those wholesalers; and in either case Vanco would be at a competitive disadvantage with respect to the Kentucky wholesalers with which it indirectly competed. The timing and direction (up or down) of the seller's pricing decisions are not material. As Judge Swygert recognized, the significant fact in determining whether a firm qualifies for the Section 2(b) defense is not whether its price was "raised" or "lowered," but whether the price differential in question results from the seller's reasonable and good faith effort to respond to the forces of competition (Pet. App. 16a-17a). Cf. *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 250 (1951).

3. This Court repeatedly has emphasized that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great A&P Tea Co.* v. *FTC*, *supra*, 440 U.S. at 80 n.13; *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 458; *Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 74. There undoubtedly is some tension between the Sherman Act—which is based on the premise that unrestrained decisions of buyers and sellers will result in maximum

consumer welfare—and the restrictions imposed on the pricing decisions of sellers by the Robinson-Patman Act—which emphasizes protection of competitors in order to safeguard the competitive system. See *United States Gypsum Co.*, *supra*, 438 U.S. at 450. But this Court has endeavored to minimize the conflict, and to give effect to Congress's broader purposes. It has "warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Great A&P Tea Co.*, *supra*, 440 U.S. at 80, quoting *Automatic Canteen Co.*, *supra*, 346 U.S. at 63.

The Seventh Circuit's unduly narrow interpretation of the meeting-competition defense ignores this Court's admonition in *Great A&P Tea Co.* Moreover, the ruling below poses an undue threat to the pro-competitive goals of the Sherman Act, since, as this Court has recognized, the Section 2(b) defense plays a major role in accommodating the tensions between the Robinson-Patman Act and the Sherman Act. *United States Gypsum Co.*, *supra*, 438 U.S. at 450; *Standard Oil Co.* v. *FTC*, *supra*, 340 U.S. at 248-250. Firms throughout the Seventh Circuit now face an increased risk of treble damage liability whenever their efforts to match competitive prices take the form of general or systematic pricing decisions, rather than ad hoc responses. Given the current unsettled state of the law in the lower federal courts, and the practical importance of properly interpreting the meeting-competition defense, further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question One presented in the petition.[16]

Respectfully submitted.

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[16] Questions Two through Four are concerned with the facts of this particular case and do not warrant review by this Court.

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Respondent's Reply Brief

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

REPLY OF VANCO BEVERAGE, INC. TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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REPLY OF VANCO BEVERAGE, INC. TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Vanco Beverage Co., Inc. ("Vanco") filed its Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit on February 5, 1982. On February 10, 1982, without prior notice, Vanco received by mail the Brief for the United States as Amicus Curiae supporting, in part, the Petition of Falls City Industries, Inc. ("Falls City"). This is Vanco's reply to the amicus brief.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This case is not an appropriate one to serve as a vehicle for clarification of whether, as a matter of law, the meeting competition defense may ever be available when the defendant has adopted a pricing system. This is a fact case, which simply does not raise the legal issue the amicus seeks to present to this Court.

The Meeting Competition Defense Was Not Established as a Matter of Fact.

This case was heard by the district court in a five day bench trial as neither side made a jury demand.[1] The judge

[1] Judge Cale J. Holder, the district judge who decided the case, was appointed by President Eisenhower. He has served with distinction on the United States District Court for the Southern District of Indiana.

actively questioned witnesses, focusing in particular on the motivation of Falls City's management for maintaining its discriminatory prices (see Brief in Opposition at 22, 23). The court entered careful and thorough findings of fact as well as conclusions of law. Among those findings of fact were specific findings as to the motivation for the price discrimination.[2] Section 2(b) puts the burden of establishing the good faith meeting competition defense on the defendant. Judge Holder found, based on his findings of fact and on his evaluation of the credibility of the witnesses, that Falls City's "prices were not established in good faith to meet an equally lower price of a brewery competitor" (Pet. 37a). The attempt of the Petitioner and the amicus to ignore the court's factual findings and to treat the case as if it raises a legal question is, as will be shown below, inconsistent with the opinion they seek to overturn and with Rule 52 of the Federal Rules of Civil Procedure:

> Findings of fact [by the court] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.[3]

The amicus has ignored the factual basis of the appellate opinion and has described it as if it created a per se rule of law. It contends that the district and appellate courts held:

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[2] These findings, which were specifically affirmed by the appellate court, are, in part, quoted *infra* at 3-4.

[3] The appellate court showed appropriate deference to the finder of fact in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). *Balian* is not inconsistent with the decision in the present case because in *Balian*, the court found that the defendant's price reductions were "unquestionably necessary to eliminate a great many of the chiselling cuts, special advantages and rebates given by its competitors in this very area" (*id.* at 366). In other words, the *Balian* defendant demonstrated that it was responding to price cuts by its competitors, and that there was genuine and vigorous price competition. Falls City did not even attempt to make a similar showing.

> that as a matter of law, an area pricing system like Falls City's can never qualify for the defense prescribed in Section 2(b). This conclusion forecloses any inquiry into market conditions to determine whether differing area price systems are a reasonable means of meeting competition in the commercial context of a particular seller's operations. (*Id.* at 7.)

This is an egregious mischaracterization of the appellate court's decision. The lengthy quotation below shows that the appellate court, like the district court, *was* inquiring into market conditions to determine whether the price discrimination was a reasonable response to meeting genuine price competition in the particular commercial context. Neither court ruled that price systems cannot be used to meet genuine price competition.[4]

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[4] Vanco also believes the amicus exaggerates the inconsistency among the circuits and the purported confusion in the cases. Although *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674, *cert, denied*, 361 U.S. 826 (1959) and *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 360 F. 2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966), appear to state that the Section 2(b) defense is unavailable in the context of a pricing system, the decisions of the Federal Trade Commission reveal that in the *Standard Motor Products* case the industry-wide rebate system adopted by the defendant was illegal and that the defendant used its rebate system to gain new customers, and that in the *Exquisite Form Brassiere* case the system adopted by the defendant went beyond and was not responsive to those of its competitors. *Standard Motor Products, Inc.*, [1957-1958 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 29,960; *Exquisite Form Brassiere, Inc.*, [1963-1965 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 16,753. All of the other cases cited by the amicus in note 7 and notes 9-12 of its brief appear to agree that the defense may—depending on the facts—be available when the defendant has used a pricing system. A review of those decisions reveals that each time the defense was successful the defendant had established facts showing that it was in good faith meeting genuine price competition. *See*, e.g., discussion in note 3, *supra*. When the defense was unsuccessful it was, as here, because the defendant showed merely that it had adopted a price system, without showing that the system was adopted to meet genuine price competition.

What the appellate court actually held was:

> Section 2(b) permits a seller to rebut a prima facie case under Section 2(a) by showing that its lower price to any purchaser "was made in good faith to meet an equally low price of a competitor * * *." This Section "places emphasis on individual situations, rather than upon a general system of competition," and is *designed to allow a seller to defend his business against genuine price competition. Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753, 65 S.Ct. 971, 974, 89 L.Ed. 1338. However, the exception does not justify the maintenance of discriminatory pricing among classes of customers that results *merely from the adoption of a competitor's discriminatory pricing structure. Id.* at 756, 65 S.Ct. at 976.
>
> The district court rejected Falls City's Section 2(b) defense on the basis of its findings that Falls City's discriminatory pricing resulted from price increases in Indiana, not price decreases in Kentucky, and that in setting its Indiana prices Falls City was simply taking advantage of its competitors' policies of charging higher prices in Indiana than in Kentucky and other states. These findings are not clearly erroneous. There is nothing in the record to show that Falls City first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition. Indeed, Falls City's president testified that Falls City's Indiana price was set higher than its Kentucky price "because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned" (Tr. 948). The district court therefore did not err in finding that *Falls City had failed to meet its burden of showing that its discriminatory pricing was a good faith effort to defend against competitors.* Cf. *A.E. Staley Manufacturing Co., supra.* (Pet. at 9a-10a, emphasis supplied.)

It is clear that the authors of the amicus brief are not familiar with the record in this case or with the previous arguments of the parties. It is their brief, not the appellate court, which fails to make the requisite "inquiry into market conditions" and assessment of "the commercial context

of a particular seller's operations" (see Amicus Br. at 7). The amicus simply ignores the following unchallenged facts: 1) Falls City's Indiana price was higher than its price in any other state in which it sold beer (Tr. 965-966); 2) Falls City's competitors' prices were higher in Indiana than in other states (PX 30, p. 106); 3) Falls City's competitors charged different prices in different counties in Kentucky but Falls City charged a single state-wide price in Kentucky (Tr. 948); 4) Falls City could have sold to Vanco and its Kentucky competitor at the same price (Tr. 945-946); and 5) throughout the relevant period, Falls City raised prices in Kentucky and Indiana, raising its Indiana prices more, and never cut prices to any customer in either state (DX 15).[5]

The Defendant Was Participating in Oligopoly Pricing.

A review of all relevant facts shows that there was no genuine price competition that would justify use of the Section 2(b) defense. The high concentration of market shares among a few sellers reveals that the market involved was oligopolistic.[6] Four brewers accounted for 72% to 76%

[5] The amicus asserts that the "economic effects" of discriminatory price increases are identical to those of discriminatory price reductions. Even if this may sometimes be true from the perspective of the purchasers, it is manifestly not true from the perspective of the ultimate consumers, whom the antitrust laws were designed to protect. Moreover, where it can be shown, as it was in this case, that the higher prices adopted reflect the artificially high prices maintained by competitors, the fact that the discrimination arose from such increases is highly relevant to the conclusion as to whether the defendant really believed such discrimination to be necessary to meet genuine price competition.

[6] Judge Swygert speculated, in his dissent from the opinion of the majority of the appellate panel, that "[c]ompetition among brewers in Kentucky was evidently stiffer than it was in Indiana. . . ." (Pet. at 17a.) This is contrary to the evidence of oligopoly pricing and to the admission by the president of Falls City that it competitors were the same in Kentucky as in Indiana (PX 30, pp. 23-24).

of beer sales in Evansville, Indiana during the period 1972 through 1977 (DX 9). Falls City had the second largest market share in Evansville, Indiana in 1972 and 1973, and remained one of the top four sellers in Evansville through 1976 (*id*). Five brewers accounted for 71% to 85% of beer sales in the State of Indiana from 1972 through 1977, and Falls City was one of those five brewers from 1972 through 1974 (DX 12). The brewers with the largest market share were identified by the president of Falls City as that firm's competitors (PX 30, pp. 23-24).

There was no vigorous price competition between Falls City and its competitors. Neither Falls City nor, apparently, its competitors, ever decreased prices in Indiana or Kentucky during the relevant period (DX 15). Falls City's president admitted Falls City priced higher in Indiana because he believed this policy was more profitable than pricing below its competitors to get increased volume. Further, he testified that it was Falls City's policy to raise prices as soon as its competitors raised prices:

> Q. When you learned that Pabst or Strohs was raising the price, what did you do at Falls City?
>
> A. We would sit down, get our pencils going, and see what we could justify as to price, and be sure we try to follow them as quickly as possible.

(Tr. 936).

Although Falls City's participation in oligopoly pricing may not be directly redressable under the antitrust laws, there is no reason in policy or logic that such participation should be allowed as a *defense* to a Robinson-Patman Act violation. Economists have long noted the tendency for some oligopoly markets to avoid vigorous price competition.[7] The

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[7] Many theories have been advanced to explain oligopoly pricing, and many solutions to the problem have been proposed. For an overview, see R.A. Posner and F.H. Easterbrook *Antitrust*, pp. 331-346 (2d ed. 1981). Advocates of the "interdependence" theory of oligopoly pricing argue that artificially high prices occur because oligopolists base their pricing decisions in part on anticipated reactions to their prices by other oligopolists. The theory assumes that

result is price stability at an artificially high level.[8] Economists and lawyer-economists have debated whether such oligopoly pricing is the result of independent decision making which cannot be reached by Sections 1 & 2 of the Sherman Act, 15 USC §§ 1 & 2, or whether such pricing is a form of tacit collusion that should be reached by the Sherman Act.[9]

Moreover, as is discussed in Vanco's response to the Petition,[10] leading economists and lawyer-economists, including those cited by the amicus, state that persistent price discrimination is anticompetitive, and some state that

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oligopolists' pricing decisions are highly visible, and that oligopolists believe that any price reduction by one would result in reductions by the others, thereby lowering industry profits for all. Prices reach artificially high levels through "price leadership," where one or more firms takes the lead in raising prices, and the others always follow. See F.M. Scherer, *Industrial Market Structure and Economic Performance*, ch. 7 and 10 (2d ed. 1980), and D.F. Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal," 75 Harvard Law Review 655-706 (1962).

[8] Note, "Meeting Competition Under the Robinson-Patman Act," 90 Harvard Law Review 1476, 1481 (1977).

[9] Advocates of the interdependence theory argue that since independent decisions are involved, there is no conspiracy. See n. 10, *supra*. However, R.A. Posner argues that the interdependence theory is inadequate to explain oligopoly pricing and that artificially high prices are the result of collusion, tacit or express, or of some form of legal monopoly. Posner argues that the traditional approach to conspiracy, which requires proof of explicit acts of agreement or communication, is inadequate to reach tacit collusion, and he advocates examination of economic evidence to determine whether there is collusion resulting in artificially high prices. Among the symptoms of collusion that Posner suggests are persistent price discrimination, exchanges of price information, and regional price variations. All three elements are present in this case. R.A. Posner, *Antitrust Law, An Economic Perspective*, pp. 39-77 (1976) (ch. 4, Price Fixing and the Oligopoly Problem).

[10] At pp. 19-21.

it is evidence of collusion. Thus, according to R.A. Posner and F.H. Easterbrook, *Antitrust,* 339 (2d ed. 1981):[11]

> Persistent discrimination is very good evidence of monopoly because it implies that some consumers are paying more than the cost of serving them. That situation would disappear with competition.

In contrast to persistent price discrimination, such leading economists and lawyer-economists state, sporadic price discrimination is procompetitive.[12] Sporadic price discrimination causes price competition and erodes prices to lower levels, all of which benefits the consumer.[13]

Economists and lawyer-economists view sporadic price discrimination as especially valuable in undermining "oligopolistic discipline" in pricing,[14] in the following manner: an industry member grants a secret reduction to an aggressive buyer. Word of the reduction leaks out, perhaps when the buyer seeks similar reductions from other industry members. The other industry members match or undercut the original reduction, and price concessions spread. List prices become increasingly unrealistic and are eventually reduced. As secret price shading occurs, sellers lose confidence in their rivals' willingness to cooperate toward a common price policy.[15]

This Court has recognized the value of sporadic price discrimination in undermining oligopolistic interdependence in pricing.[16] In *United States* v. *United States Gypsum,* 438 U.S. 422, 457 (1978), this Court stated that discriminatory price concessions "provide the main element of competition in oligopolistic industries and the primary occasion for

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[11] Cited at p. 13, n. 14 of the Amicus Br.

[12] See pp. 20-21 of Vanco's Response to Petition.

[13] See R.A. Posner and F.H. Easterbrook, *supra* n. 7, at 339.

[14] F.M. Scherer, *supra* n. 7, at 324.

[15] Id.

[16] Sporadic discrimination might, in some circumstances, occur in the context of a price system, just as persistent price discrimination may occur in the context of individually set prices.

resort to the meeting-competition defense." Section 2(b) has been interpreted in a way that encourages price competition and prevents use of Section 2(b) as a means to collude in pricing. *Great Atlantic & Pacific Tea Company, Inc.* v. *Federal Trade Commission*, 440 U.S. 69, 80 (1979); *United States* v. *United States Gypsum, supra.*

In both *Great Atlantic & Pacific* and *United States Gypsum*, this Court considered whether a seller hearing of an alleged price cut of a competitor should verify that price cut with the competitor before matching the price cut. In both cases this Court stated that it did not favor such exchanges of price information due to the possibility that such exchanges "would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers." *Great Atlantic & Pacific Tea Company, supra.*, at 80; *United States Gypsum, supra.*, at 457-458. This Court further stated, in both cases, that price competition is more likely to occur where there is uncertainty about competitors' prices (*id*).

In this case, there was no sporadic price discrimination, there were no secret price concessions, there was no process leading to an erosion of prices. Instead, there was a disciplined, upward price spiral pursuant to a price system. As stated earlier, it was Falls City's policy to follow price increases and to not reduce its own price, because Falls City believed that it was more profitable to follow price increases than to compete for volume by lowering its price. Certainty about rivals' prices was possible because the ground rules were clear—the president of Falls City testified that it was general industry practice to price higher in Indiana than Kentucky. Price information was freely available (Amicus Br. at 9), and in fact Falls City obtained some price information from competitors (PX 219, p. 26).

Section 2(b) is being used to defend the very type of oligopolistic price discipline that this Court has sought to prevent through its interpretation of Section 2(b).

CONCLUSION

The amicus repeatedly stresses public policy underlying the antitrust laws (Amicus Br. at 1, 16). Vanco is well aware that there may at times be a "tension" between the Robinson-Patman Act and the Sherman Act, but in this case no such tension exists. The proposal of the amicus amounts to a per se rule that adoption of a pricing system which echoes the pricing systems of one's competitors is an automatic defense to a *prima facie* case of price discrimination.[17]

In an apparent attempt to alleviate the "tension" between the Robinson-Patman and Sherman Acts, which is an issue for the Congress, the amicus has postulated, in order to strike down, a rule of law that is not articulated in the district or appellate court opinions and over which there is no substantial confusion among the circuit courts.

For the foregoing reasons, and particularly in light of the fact that this case has been remanded by the appellate court in the light of this Court's ruling in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 101 S. Ct. 1923 (1981), Falls City's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

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Dated: February 22, 1982

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[17] R.A. Posner, in The *Robinson-Patman Act*, p. 42 (1946) states: "if it were interpreted liberally the section 2(b) defense could destroy section 2(a). If every seller in a market could defend his discriminatory pricing practices by reference to comparable discriminations on the part of its competitors, how could the circle be broken and a marketwide practice of discrimination eliminated?

Petitioner's Brief

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the good faith meeting competition defense of Section 2(b) of the Robinson-Patman Act is available to a firm that adopts a market-wide pricing system, as opposed to customer-by-customer prices, in response to the lower prices established by its competitors.

2. Whether the court of appeals erred in applying the competitive injury test of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), where there was no evidence of seller predation or of systematic preference to large buyers, and where the evidence showed that the plaintiff lost sales because the defendant supplier was a dying regional brewer that lost sales in all of its markets.

NOTICE PURSUANT TO RULE 28.1

Pursuant to Supreme Court Rule 28.1, petitioner Falls City Industries, Inc., the parent company, states that it has no subsidiaries other than wholly-owned subsidiaries and that it has no affiliates.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 654 F.2d 1224 (7th Cir. 1981). The opinion of the district court is reported at 1980-2 Trade Cas. ¶ 63,357 (S.D. Ind. 1980). Copies of the court of appeals and district court opinions are reprinted in the Appendix to the Petition.

JURISDICTION

The court of appeals entered judgment on July 15, 1981. A timely petition for rehearing and suggestion for

rehearing en banc was denied on September 29, 1981. Justice Stevens extended the time to petition for certiorari to and including January 7, 1982, and the Petition was filed on that date. The Court granted the Petition on March 1, 1982, limiting review to Questions 1 and 2. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13, are as follows:

> § 2(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .
>
> (b) . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a claim that petitioner Falls City Industries, Inc. ("Falls City"), a small regional brewer,

violated the Robinson-Patman Act by selling beer at higher prices to Indiana wholesalers than to Kentucky wholesalers. Respondent Vanco Beverage, Inc. ("Vanco") was a Falls City distributor in Evansville, Indiana, which is approximately ten miles from Henderson, Kentucky. Vanco was prohibited by law from competing with Kentucky wholesalers for sales to retail accounts.[1] Vanco contended, however, that it competed indirectly with Falls City's wholesale distributor in Henderson, Kentucky, Dawson Springs Beverage Co. ("Dawson Springs"), through competition among their retail accounts.

Vanco brought this action in December 1976, charging that Falls City's Indiana-Kentucky price differential violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Falls City admitted the price disparity but contended that (1) Vanco had not proved the requisite competitive injury under Section 2(a); (2) Falls City had a complete defense under Section 2(b) of the Act because its lower Kentucky prices were necessary to meet competition in that state; and (3) Vanco failed to prove antitrust injury to its business.

B. Facts

It is undisputed that a differential between the f.o.b. prices that brewers charged wholesalers in Evansville, Indiana, and those charged to wholesalers in Henderson, Kentucky, existed as to all brands of beer sold in those markets. Indiana and Kentucky brewery prices differed because state laws prohibiting competition from out-of-state wholesalers caused each state to develop its own distinct structure of wholesale beer prices and of brewers' f.o.b. prices. (DX 54, Pet. App. 59a, Tr. 709; DX 62, Pet. App. 60a, Tr. 717, 718; DX 28, J.A. 188,

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[1] Indiana and Kentucky wholesalers of beer are prohibited by law from selling to out-of-state retailers. Ind. Code Ann. § 7.1-3-3-5 (Burns Cum. Supp. 1981); Ky. Rev. Stat. § 243.180 (repl. 1981).

Tr. 512; PX 231, J.A. 178, Tr. 966; DX 14, J.A. 182, Tr. 903; J.A. 89-90, 91-92.) Consequently, all brewers charged higher prices to Indiana wholesalers than to Kentucky wholesalers. This historic and industry-wide pricing practice is at the core of Vanco's complaint.

It is further undisputed that Falls City's Indiana-Kentucky price difference arose because it set prices responsive to the prices of the leading brewers who sold beer in Indiana and Kentucky. (J.A. 86-91.) Falls City kept itself informed of market prices in Indiana and Kentucky through reports from state agencies, sales representatives and customers, and it tried to stay competitive with them. (J.A. 86-87, 93-94; DX 28, J.A. 188, Tr. 512; PX 231, J.A. 178, Tr. 966.) Falls City's prices to its Kentucky wholesalers closely approximated those of Pabst and Stroh's, who were its principal competitors in Kentucky. (J.A. 86-87, 89-90.) Similarly, Falls City's prices to its Indiana wholesalers were approximately equal to those of Pabst and Stroh's, who were also its main rivals in Indiana. (PX 231, J.A. 178, Tr. 966; J.A. 86-90.) All of Falls City's sales were f.o.b. its Louisville brewery. (Tr. 933.) There is no dispute that Falls City's Indiana prices would have been noncompetitive with the lower prices charged by other brewers to their Henderson, Kentucky wholesalers.[2]

Sales of the leading national brands grew rapidly in Evansville during the period involved in this suit. From 1972 to 1977, Miller's Evansville sales increased by nearly 520 percent, Stroh's grew by more than 150 percent, and

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[2] Indiana law (Ind. Code Ann. § 7.1-5-5-7 (Burns 1978)) requires brewers to sell to all Indiana wholesalers at the same price. Consequently, Falls City could have equalized its Evansville and Henderson prices only by reducing its price to all Indiana wholesalers or, alternatively, by charging a noncompetitively high price in Henderson, Kentucky.

Anheuser-Busch's grew by more than 70 percent. (DX 10, Pet. App. 57a, Tr. 901.) The Evansville distributors who carried the popular national brands of beer all increased their sales from 1972 to 1977. (DX 8, Tr. 900.) Thus, Vanco's sales of the successful Anheuser-Busch and Heileman brands increased as its Falls City sales eroded over the period. By 1977, Vanco was the largest beer distributor in Evansville (DX 11, Pet. App. 58a, Tr. 901, 902), and its total beer sales in 1978 were 28 percent greater than in 1972. (PX 95, J.A. 145, Tr. 414, 415; DX 25, Tr. 912.) These increases in Vanco's sales of Anheuser-Busch and Heileman brands were achieved notwithstanding the fact that brewers of those brands charged higher prices to Vanco than to their distributors in Henderson, Kentucky.

Over the same 1972-1977 period, Falls City suffered massive sales declines in all markets in which it operated. (Tr. 930-32; DX 6, Pet. App. 55a, Tr. 899; DX 23, Tr. 905, 906.) Falls City's Evansville sales fell by 57.6 percent over the period. (DX 9, Pet. App. 56a, Tr. 900, 901; DX 10, Pet. App. 57a, Tr. 901.)[3] That decline, however, was no greater than Falls City's decline in central Indiana markets remote from the Kentucky border. (DX 6, Pet. App. 55a, Tr. 899; DX 7, Tr. 899.) Thus, Falls City sales fell by 60.87 percent in Indianapolis, 61.10 percent in Plainfield, 64.21 percent in Lafayette, and 66.18 percent in Muncie; and for a group of thirteen contiguous central Indiana counties as a whole, Falls City's sales declined by 60.7 percent. (*Id.*) Falls City's Evansville de-

[3] Vanco's sharpest decline in Falls City sales occurred in 1973 when those sales fell by nearly 60,000 cases from the 1972 level. (*See* DX 51, Pet. App. 54a, Tr. 701, 702.) The difference between the Falls City Indiana and Kentucky f.o.b. prices was the same in 1973 as in 1972 (DX 15, J.A. 186, Tr. 904), and contemporaneous documents written by Vanco's officers did not cite the price difference as even a partial cause of the decline. The factors cited by Vanco were a decline in Falls City's "image," a wildcat strike by Vanco's truck drivers, and competition from "price brands" in Evansville. (DX 1, J.A. 179, Tr. 598, 599.)

cline was not matched by any corresponding increase in Henderson, Kentucky. In fact, Dawson Springs' sales of Falls City also dropped sharply from 1972 to 1977. (DX 51, Pet. App. 54a, Tr. 701, 702.)

The evidence showed that Vanco identified its "competition" as the Evansville distributors of other brands of beer and set its prices to meet their prices in Evansville (DX 66, pp. 85-87, J.A. 233, Tr. 985); Vanco never adjusted its prices to meet Henderson price competition (Tr. 722-23); and Evansville wholesale prices were different from, and moved independently of, wholesale prices in Henderson, Kentucky (*compare* DX 54, Pet. App. 59a, Tr. 709, *with* DX 62, Pet. App. 60a, Tr. 717, 718).

After sustaining substantial sales losses, Falls City terminated its brewing operations in November 1978. (Tr. 918-19, 922-23; DX 23, Tr. 905, 906.) It thereby joined the ranks of the hundreds of small brewers that have been eliminated since World War II in the face of competition from the large, nationally-advertised brands. (Tr. 920-24.)

C. Proceedings Below

The district court held after a bench trial that Falls City had violated Section 2(a) of the Robinson-Patman Act. (Pet. App. 46a.) The court found that Evansville and Henderson formed a single retail beer market, that Vanco and Dawson Springs competed through their retail accounts, and that the brewery price differential caused Vanco's loss of Falls City sales. (Pet. App. 28a-29a, 31a-36a.) The court did not reject the factual underpinnings of Falls City's meeting competition defense, *i.e.*, that the lower price in Kentucky was required for Falls City to be competitive with other brands. It nevertheless rejected the defense on the grounds that Falls City's prices in Kentucky were not set on a customer-by-customer basis in response to specific competitive "threats" and that the price differential resulted from price increases in Indiana,

not price decreases in Kentucky. (Pet. App. 37a-38a.) The court awarded Vanco damages equal to the full amount of the price differential, or $575,293.79 before trebling. (Pet. App. 47a-48a.)

The district court found no evidence to support Vanco's charge that Falls City set its prices pursuant to an unlawful pricing agreement with competing brewers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and it dismissed that count of the complaint. (Pet. App. 45a.) That holding was not challenged on appeal.

A divided panel of the court of appeals affirmed the finding of liability under the Robinson-Patman Act but remanded the case for reassessment of damages in light of this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). (Pet. App. 11a-12a.) The court held that under *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), competitive injury could be inferred from the existence of a substantial price differential, and it concluded that the f.o.b. price differential was a material cause of Vanco's loss of Falls City sales. (Pet. App. 7a-9a, 10a-11a.) Like the district court, the court of appeals disregarded the evidence that (1) sales of the national brands escalated rapidly in Evansville notwithstanding the price differential, and (2) Vanco's loss of Falls City sales was no greater than that sustained by Falls City distributors in central Indiana. (Pet. App. 7a-9a, 10a-11a.) The court also rejected Falls City's meeting competition defense. It interpreted this Court's holding in *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), to require customer-by-customer price responses, and asserted that there was "nothing in the record to show that Falls City first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition." (Pet. App. 9a-10a.)

Judge Swygert dissented. He found that Falls City's practice of charging lower prices in Kentucky to meet the competition there was "the essence of a Section 2(b) de-

fense." (Pet. App. 17a.) Relying on this Court's admonition in *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978), that the Section 2(b) defense is to be "'a flexible and pragmatic'" concept and on *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966), Judge Swygert concluded that Section 2(b) is not limited to meeting competition in individual situations and does not preclude "instituting a single competitive price." (Pet. App. 16a-17a.) Further, he found that the lower brewery prices in Kentucky resulted from "competitive forces that develop[ed] over the years." (Pet. App. 16a.) It was not possible to say whether the differential arose from raising Indiana prices or lowering Kentucky prices, and the validity of the meeting competition defense "cannot rest on so narrow a perspective." (Pet. App. 16a.) Judge Swygert concluded that under *Callaway Mills*, the "adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition" and that Falls City's lower Kentucky prices were necessary "to meet the competition there." (Pet. App. 17a.) [4]

SUMMARY OF ARGUMENT

The price differential challenged in this case arose because Falls City, a small regional brewer, set prices responsive to those established by its principal competitors in Henderson, Kentucky and Evansville, Indiana. Those competitors, like all other brewers, charged lower prices to wholesalers in Kentucky than to those in Indiana, a situation resulting from state regulation and market developments over the years.

I. Falls City's price in Henderson, Kentucky was adopted to meet competition and hence was valid under Sec-

[4] Judge Swygert also dissented from the majority's affirmance of the district court's determination that Falls City had overcharged Vanco for state excise taxes. (Pet. App. 17a n.6.) Certiorari was not granted on this point, nor on an issue presented with regard to proof of business injury and damages under *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

tion 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b). The court below rejected this defense on the ground that Falls City adopted a state-wide price in Kentucky instead of responding on a customer-by-customer basis to the competitive prices. Nothing in the language of the Act requires so doctrinaire and restrictive a reading of the meeting competition defense, and this Court's decisions strongly refute it. An area-wide price can be an entirely reasonable and prudent method of meeting the lower prices of a competitor in "good faith," which is all that the statute requires. This Court has supported a realistic and pragmatic approach to Section 2(b), and a number of courts of appeals have explicitly upheld system pricing as valid under the Act.

Contrary to the view of the court below, the Court's decision in *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), does not require a different result, since that decision was limited to a collusive basing-point system which prevented price competition. Nor is there any basis for requiring that a defensive lower price be prompted by a prior specific price reduction. At issue is not sequence or timing, but only Falls City's good faith meeting of lower competitive prices, which was clearly shown.

II. The undisputed facts in this case demonstrate the absence of competitive injury from Falls City's differential, a requisite of a finding of violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). This is conclusively shown by the increases in sales in Evansville of other brands of beer subject to the same differential, Vanco's pricing without reference to Kentucky prices, the pivotal role of intervening wholesale and retail pricing and marketing decisions, and similar or greater losses in Falls City sales in Indiana markets not influenced by the differential. Vanco's losses in Falls City sales were clearly due to the brand's failure, not to the f.o.b. differential.

The finding of the court below that Falls City's f.o.b. price differential caused the requisite competitive injury under Section 2(a) resulted from its improper interpretation of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), as establishing a presumption of injury. Such a presumption may be appropriate in secondary-line cases where, as in *Morton Salt*, substantial price preferences were granted to market leaders. But in the present case, where there is no evidence of large buyer preference or seller predation, there can be no substitute for the "realistic appraisal[] of relevant competitive facts" mandated by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963). The competitive facts here are legally insufficient to establish a causal nexus between Vanco's sales loss and the f.o.b. price differential, and the finding of liability under Section 2(a) must, therefore, be reversed.

ARGUMENT

I. FALLS CITY'S GOOD FAITH ADOPTION OF AN AREA-WIDE PRICE TO MEET COMPETITION ESTABLISHED A DEFENSE UNDER SECTION 2(b) OF THE ROBINSON-PATMAN ACT

As Judge Swygert concluded, Falls City established a good faith meeting competition defense as a matter of law. (Pet. App. 15a.) Falls City's prices to Indiana and Kentucky wholesalers were responsive to the general range of prices set by Falls City's competitors in those areas, and, in particular, Falls City's prices in Henderson, Kentucky closely followed the prices of its principal competitors in that market. The court of appeals did not dispute these facts, but nevertheless concluded that Falls City did not have a meeting competition defense under Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), because (1) it adopted area-wide, rather than customer-by-customer, price responses; and (2) the f.o.b.

price differential resulted from "price increases in Indiana, not price decreases in Kentucky." (Pet. App. 9a-10a.) The ruling below is an untenable reading of the Act. It would have pernicious and anticompetitive consequences in conflict with the central goals of the antitrust laws, and would confront Falls City with the impossible choice of eliminating the price differential either by reducing the price to every Indiana wholesaler, or by raising the price to a noncompetitively high level in Henderson, Kentucky.

A. Section 2(b) Permits Area-Wide Pricing To Meet Competition

The purpose of Section 2(b) is to permit a firm to charge different prices to different purchasers because of competitive circumstances—not to penalize it for price competition. As the Court emphasized in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), "good faith" under Section 2(b) " 'is a flexible and pragmatic, not technical or doctrinaire, concept' . . . ." *Id.* at 454, quoting *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963). Section 2(b) "does not place an impossible burden on sellers," but only "requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759-60 (1945); *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82 (1979). Thus, "[a] good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense." *United States Gypsum Co.*, 438 U.S. at 453. When properly applied, Section 2(b) fosters active price competition among sellers by enabling a firm to price in "self-defense" and to respond "realistically" to different conditions in differ-

ent markets. *Standard Oil Co. v. FTC*, 340 U.S. 231, 248-50 (1951). The court's goal in applying the Robinson-Patman Act must be "'to maintain active competition—including price rivalry—among the members of the business community.'" *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982).

Nothing in the language of the Act suggests that the meeting competition defense is confined to customer-by-customer responses. The focus of Section 2(b) is on a seller's response to competitive situations; while the statute's reference to "a competitor" is in the singular, the seller's pricing response is described as one to a "purchaser" or "purchasers" and the emphasis is on the seller's "good faith." The goal of Section 2(b), therefore, is to permit a firm to meet competition in the market as a whole. This Court's decisions on the interpretation of Section 2(b) strongly support this common-sense interpretation. A price system, such as Falls City's area-wide price, can be a "good faith" and entirely "reasonable and prudent" response to the competitive conditions facing a seller. Indeed, as here, it can be the only "realistic" and practical way for a small firm to attempt "to maintain active competition." The alternatives posed to Falls City for eliminating the differential were neither realistic nor practical.

A number of soundly reasoned cases expressly approve various pricing systems as good faith efforts to meet competition. The leading case is *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966). There the Fifth Circuit rejected the argument that "a pricing system" is "condemned per se," holding that "[i]t is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned." *Id.* at 441-42. The Fifth Circuit held that the defendant was not required to lower prices in a "piecemeal

fashion." *Id.* at 441-42. A decision to fashion an annual volume discount system was found to be a good faith response under Section 2(b) because it was a reasonable way of meeting the prices established by the seller's larger competitors through similar discount systems.

Citing *Callaway* with approval, the Ninth Circuit held in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), that Section 2(b) permits a firm to meet competition by reducing prices for a class of products in an entire marketing area. Although the plaintiff argued that the defendant was not acting in good faith because it made its lower price available throughout the market, the Ninth Circuit ruled that "we are not convinced that market-wide price reductions are fatal to the defense in all instances." *Id.* at 1045. It interpreted Section 2(b) to permit price reductions " 'which are granted not only to particular customers tempted by competitive prices, but which respond in a given area by blanket price reductions co-extensive with the price competition to be met,' " and concluded that "[m]arket-wide price reductions are permissible when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market." *Id.* at 1045-46 (citation omitted).

Similarly, in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), the Ninth Circuit rejected the argument that the meeting competition defense was unavailable because defendant's area-wide price structure "did not meet 'individual competitive situations,' but blanketed a local area with a market-wide price cut . . . ." 231 F.2d at 361. The court held that the defendant acted reasonably in adopting an area-wide price in the "intensely competitive" Los Angeles market. *Id.* at 368.[5]

[5] Support for pricing system responses also is provided in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d

The reasoning of these cases is supported by this Court's emphasis on a pragmatic approach toward Section 2(b). Thus, in *United States Gypsum Co.*, 438 U.S. at 450, the Court emphasized that Section 2(b) "implicitly suggests a somewhat imperfect matching between competing offers actually made and those allowed to be met," and rejected the notion that Section 2(b) requires an exact, customer-by-customer matching of prices. *Id.* at 452, 459 n.32.

Not only is the use of an area-wide price entirely consistent with the statute and with the decisions of this Court, but any other result would be contrary to the Robinson-Patman Act's goal of promoting price competition, would be anticompetitive, and would place an unreasonable burden on small firms. This Court repeatedly has emphasized that the interpretation of Section 2(b) must take into account the critical role that that Section plays in reconciling "the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts." *United States Gypsum Co.*, 438 U.S. at 450; *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-50 (1951). In reconciling this conflict, the protective goals of the Robinson-Patman Act must be construed consistently with the broader price competition goals of the Sherman Act; overly restrictive interpretations of Section 2(b) only " 'help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.' " *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 & n.13,

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714, 725-26 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) ("In order to avail itself of [2(b)], AMXCO need only have shown that its pricing system was a reasonable method of meeting Vebco's lower price"); *Forster Manufacturing Co. v. FTC*, 335 F.2d 47, 54-56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965) (remanding for a determination whether defendant's area-wide discount was a reasonably prudent method of meeting several individual competitive offers); *Ludwig v. American Greetings Corp.*, 282 F.2d 917, 918-19 (6th Cir. 1960), *appeal dismissed*, 366 U.S. 269 (1961), *aff'g* 1960 Trade Cas. ¶ 69,830 (N.D. Ohio 1959)(territory-wide guaranteed sales policy upheld under Section 2(b)).

quoting *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953); *United States Gypsum Co.*, 438 U.S. at 450. The Department of Justice has noted that "[t]he use of an area-wide response to a range of competitors' prices would appear to be a particularly reasonable response by a small firm," since the "administrative costs of price negotiations with individual customers may impose a greater burden on smaller firms than on their larger rivals." Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, at 12 n.13. *See* Kaapcke, *Freedom of Pricing and Competition*, 26 A.B.A. Sec. Antitrust L. 55, 59 (1964).

B. Falls City's Lower Price In Kentucky Was A Proper Method Of Meeting Competition

The test under Section 2(b) is not whether a firm adopted an individual or area-wide price, but whether a "reasonable and prudent person" would have responded as it did to the competitive conditions confronting it. *See Great Atlantic & Pacific Tea Co.*, 440 U.S. at 82-83. That test clearly was met here. Falls City set its Kentucky-wide price after carefully considering the competitive prices, just as a vigorous competitor would be expected to do. Its Kentucky prices were based on data made available by state agencies setting forth in detail the prices charged by each brewer in the state, and on reports from sales representatives and customers. (Tr. 944-49; DX 28, J.A. 188, Tr. 512.) Falls City's Kentucky prices closely followed, and did not undercut, the prices established by its principal competitors in that state, who were among the leading national firms in the industry. (*Id.*) The effect upon the Henderson, Kentucky market was to establish a Falls City price level that was either between the prices of the leading brands in the market, Pabst and Stroh's, or somewhat above both brands' prices.[6]

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[6] For example, in 1972 Falls City's two chief rivals, Pabst and Stroh's, were charging Henderson, Kentucky wholesalers $2.96 and

Had Falls City sought to make customer-by-customer price responses in Kentucky, there would have been no difference in competitive result. Falls City still would have had to charge a price to its Henderson wholesaler that was appreciably lower than the price in Evansville in order to meet the Henderson competition.

Further, if Falls City were forced to equalize the prices charged to Vanco and Dawson Springs, as the courts below would require,[7] it would have been put to an impossible choice. It would have had to either (1) reduce the price to every wholesaler in Indiana, since Indiana law requires a uniform price; or (2) raise the price in Henderson to a noncompetitive level. As this Court has held, however, "[t]here is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.*, 340 U.S. at 250. To compel such ruinous price cutting would be flatly inconsistent with the

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$3.07, respectively, for 12/32 non-returnable bottles. Falls City's Kentucky price was $3.03, which was midway between the Pabst and Stroh's prices. (DX 28, J.A. 188, Tr. 512.) However, its Indiana price at that time was $3.50 per case, which would have been wholly noncompetitive in Henderson, Kentucky. (DX 54, Pet. App. 59a, Tr. 709.) It is clear, therefore, that the lower Kentucky price of $3.03 was necessary to defend Falls City's business against the genuine price competition of Pabst and Stroh's. (*See* Swygert dissent, Pet. App. 17a.)

With respect to other packages, Falls City's Kentucky price was between the prices of its two rivals in some instances and slightly above both in others. Falls City did not undercut the price of both competitors on any package type (*see* DX 28, J.A. 188, Tr. 512), and Vanco does not contend otherwise.

[7] Thus, the district court stated that Falls City "had the free choice of avoiding and/or not creating" the price differential "by either reducing the price or raising the price." (Pet. App. 39a.)

realistic meeting of competition that Section 2(b) is designed to promote. *Id.*

C. This Court's Decision In *FTC* v. *A. E. Staley Manufacturing Co.* Does Not Support The Decision Below

In mistaken reliance upon *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), the court below took a narrow view of the meeting competition defense, holding that Section 2(b) permits only customer-by-customer price responses. It misinterpreted *Staley* to prohibit all area-wide approaches to pricing, relying on the Court's statement that the Robinson-Patman Act "places emphasis on individual situations rather than upon a general system of competition." (Pet. App. 9a, quoting *Staley*, 324 U.S. at 753.) But *Staley* involved an industry-wide basing-point system held to violate Section 1 of the Sherman Act. *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945). The Court rejected the defense because Staley's decision to "slavishly" follow an industry-wide collusive scheme, "as a means of securing the benefits of a like unlawful scheme maintained by his competitors," negated any claim of good faith. *Staley*, 324 U.S. at 753, 755.

Further, Staley's pricing system did not promote price competition. On the contrary, that pricing system, by including "phantom freight," gave up Staley's ability to charge lower prices to buyers located near its plant. Thus, as the Fifth Circuit has noted, the basing-point system in *Staley* had the effect of "creating *greater* discrimination than necessary. Obviously, that was not a 'good faith' effort." *Callaway Mills Co.*, 362 F.2d at 442 (emphasis in original). *Staley* does not, therefore, stand for the proposition that all pricing systems are "condemned per se." [8] *See Callaway Mills Co.*, 362 F.2d at 442; *William*

[8] Commentators have criticized the view that *Staley* prohibits all pricing systems, and have stressed that "the real issue is whether the seller's price differential under Section 2(b) was

Inglis & Sons, 668 F.2d at 1045; Swygert dissent, Pet. App. 15a. Certainly *Staley* has no applicability where, as here, a firm independently sets area-wide prices in response to the lower prices established by its competitors.[9]

Unlike the defendant in *Staley*, Falls City did not "slavishly" follow a collusive pricing system. *See* 324 U.S. at 755. Falls City's prices were independently arrived at, and were held lawful under Section 1 of the Sherman Act. (Pet. App. 45a.) Further, the perverse foregoing of locational advantage that negated Staley's good faith is entirely absent here. All of Falls City's prices were f.o.b. Louisville, and its pricing decisions enabled Falls City to be competitive with other brewers in both markets. Finally, as noted, customer-by-customer pricing would not have changed the undisputed fact that all other brewers charged lower prices in Henderson than in Evansville,

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genuinely *responsive* to a competitive price, or was simply part of a preconceived pricing policy operative *regardless of* the competitor's price." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 230 (1962) (emphasis in original) ["Rowe"]. *See* ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Vol. 1 at 128 (1980) ["ABA Monograph"] ("the question of systems is merely one aspect of the overall question of reasonableness ('good faith') of the competitive response"). Thus, "[c]arried over uncritically into contexts wholly different from that of the basing-point cases, the language of 'system' versus 'individual competitive situations' only retards the intelligent solution of 2(b) problems." *Callaway Mills Co.*, 64 F.T.C. 732, 751 (dissenting opinion of Commissioner Elman), *rev'd*, 362 F.2d 435 (5th Cir. 1966).

[9] While there has been some difference of opinion on whether a firm may copy the pricing system of its competitors, such as a discount system, it has been generally recognized that a firm may independently arrive at an area-wide price to meet the competitive situation it faces. *See* Rowe, *supra* n.8, at 239-40 ("a seller's area-wide and blanket lower price, if made in good faith to meet competitors' lower prices, may be justified under the Section 2(b) proviso as responsive to an 'individual competitive situation' "). Falls City's area-wide price was, therefore, valid *a fortiori* under *Callaway* and other authorities.

and that Falls City had to charge a lower price in Henderson in order to be competitive there.

D. The Court Below Erroneously Held That Falls City's Good Faith Competitive Price Was Unacceptable Absent Proof Of Specific Prior Price Reductions By Competitors

The decision below imposes a second, and equally misplaced, limitation on the meeting competition defense. In addition to rejecting Falls City's area-wide price, the court condemned Falls City's price differential because it resulted from "price increases in Indiana, not price decreases in Kentucky." (Pet. App. 9a-10a.) Nothing in the statute or in this Court's decisions supports this distinction. The statute simply requires proof that the seller's lower price be "made in good faith to meet an equally low price of a competitor . . . ." 15 U.S.C. § 13(b). The statute does not require that the lower price result from a predetermined sequence of pricing movements, but speaks only of meeting a competitor's lower price.

Contrary to the assumption of the court of appeals, there is no logical distinction between having to reduce a price to meet competition and being unable to increase a price for the same reason. In both situations, the lower price is justified because it enables a firm "'to maintain active competition.'" *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) (citation omitted); *see Standard Oil Co.*, 340 U.S. at 250. As Judge Swygert noted, the court's statement that the price disparity resulted from price increases in Indiana "is no more accurate than it would be to state that the differentials were caused by *lowering* the prices to Falls City's Kentucky customers. There was no norm or starting point against which such statements could be tested." (Pet. App. 16a) (emphasis in original).

The economic effect is the same whether Falls City's competitors first raised prices in Indiana, or reduced them in Kentucky. In either case, Falls City faced markets with a price differential that was "the result of competitive forces that develop[ed] over the years." (Swygert dissent, Pet. App. 16a.) Whatever the sequence or timing of price changes, Falls City could not have charged Kentucky wholesalers more for its beer than the competing brewers were charging, and it was entitled to meet such competition with an appropriate price level. "Falls City was therefore forced to charge a lower price in Kentucky to meet the competition there. Such action is the essence of a Section 2(b) defense." *Id.* at 17a.[10]

The court of appeals' interpretation of Section 2(b) would confine the meeting competition defense to an unworkably narrow range of business choices. The court's rejection of area-wide pricing condemns perfectly rational economic behavior and places a great administrative burden on smaller firms, whose competitive viability it is the purpose of the Robinson-Patman Act to protect. *See United States Gypsum Co.*, 438 U.S. at 450. Its further insistence that a defensive lower price is not justified by competitive price levels, but must be prompted by a prior specific price reduction, would impose a requirement bearing no relation to competitive realities or the purposes of the Act. In sum, because the court's unduly restrictive interpretation of Section 2(b) finds no support in the Act or in this Court's decisions, that holding must

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[10] The majority below erroneously relied on *Staley* as requiring a price decrease, focusing on the Court's statement that "[r]espondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition." 324 U.S. at 754-55. (Pet. App. 9a-10a.) But that language simply referred to the fact that in *Staley*, industry members chose not to reduce prices to customers located close to their plants, but rather charged them "phantom freight" as part of the collusive basing-point scheme. The Court's language in no sense created an additional prerequisite for invoking Section 2(b).

be reversed. Falls City has established that its price in Henderson, Kentucky was made in good faith to meet competition, and the complaint should, therefore, be dismissed.

II. THE COURT BELOW APPLIED AN IMPROPER STANDARD OF COMPETITIVE INJURY AND ITS FINDING OF SUCH INJURY WAS CONTRARY TO UNDISPUTED COMPETITIVE FACTS

A discrimination in price may be found in violation of Section 2(a) of the Robinson-Patman Act only if its effect "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition" among purchasers. 15 U.S.C. § 13(a). This finding must be made on the basis of "realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." *FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963). To find the requisite competitive injury in a secondary-line case, the court must find that (1) the disfavored purchaser is in direct competition with the favored purchaser; and (2) the price discrimination is likely to cause a substantial lessening of competition. *See Corn Products Refining Co. v. FTC*, 324 U.S. 734, 738 (1945).[11]

The court below did not make this essential analysis. Instead it erroneously relied on *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), for the proposition that competitive injury is "established" by a price difference sufficient to influence retail prices. (Pet. App. 7a-8a.) The only other authority on which it relied was *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972) (Pet. App. 7a-8a), in which the

[11] This means that the requisite competitive harm must be the result of the price discrimination, *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982), and not other market factors, *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

Seventh Circuit previously stated that it had "gone even further" than *Morton Salt* and held that "'any substantial, sustained [price] differential between competing resellers is *prima facie* injurious.'" 466 F.2d at 1174 (citations omitted). We will show below that the Seventh Circuit's overly broad standard of competitive injury is not supported by *Morton Salt* and is an unsound application of the Robinson-Patman Act. At the outset, we will demonstrate that a "realistic appraisal[] of relevant competitive facts" of this case, *Sun Oil Co.*, 371 U.S. at 527, precludes a finding of likely competitive injury.

A. The Undisputed Competitive Facts Negate Any Finding Of Competitive Injury

"In evaluating the degree of likely impact on competitive strength, we cannot ignore the actual competitive facts of the case." *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir. 1982). Here, the court of appeals, applying the oversimplified test it erroneously derived from *Morton Salt*, totally disregarded undisputed competitive facts that negate any causal nexus between Falls City's Indiana-Kentucky price difference and the alleged injury to competition in Evansville. In particular, any inference of competitive injury is defeated by the great sales growth in Evansville of the major national beers, although they were subject to the same industry-wide pricing difference as Falls City; the lack of any correlation between the amount of the price difference and the amount of Vanco's loss in Falls City sales; the fact that Vanco set its prices to meet its Evansville competition, without regard to prices in Henderson; the pivotal role played by intervening wholesale and retail pricing decisions entirely beyond Falls City's control; and the equally precipitous decline in Falls City sales experienced by wholesalers in central Indiana.

(1) *The sales growth of major national beers in Evansville.* The alleged injury from the differential is decisively

refuted by the fact that, from 1972 to 1977, the national brands of beer greatly increased their position in the Evansville market—even though those brands were sold at approximately the same Indiana-Kentucky price differentials as Falls City. (*See* DX 14, J.A. 182, Tr. 903; DX 9, Pet. App. 56a, Tr. 900, 901; DX 10, Pet. App. 57a, Tr. 901; J.A. 90, 91-93.) The salient competitive fact in the beer industry has been the growing domination of the industry by large national brewers, which has caused the elimination of more than four hundred smaller brewers since World War II, including Falls City. (Tr. 920-24.) This industry trend was operative in Evansville as in other markets. Thus, from 1972 to 1977, Miller's beer sales in Evansville grew by a spectacular 519 percent, Stroh's by 152 percent and Anheuser-Busch's by 72.9 percent. (DX 10, Pet. App. 57a, Tr. 901; *cf.* DX 12, Tr. 902); and the Evansville distributors who carried those brands all increased their overall beer sales during the period. Accordingly, while Vanco's Falls City sales declined, its sales of the more viable brands increased. By 1977 Vanco was the largest beer distributor in Evansville, and its total beer sales in 1978 were 28 percent higher than in 1972. (DX 11, Pet. App. 58a, Tr. 901, 902; PX 95, J.A. 145, Tr. 414, 415; DX 25, Tr. 912.)

(2) *No correlation between the amount of Vanco's loss in Falls City sales and the amount of the Indiana-Kentucky price difference.* If there were a causal nexus between the f.o.b. price difference and Vanco's sales performance, there should be a positive correlation between the amount of the price differential and the rate of Falls City's sales loss in Evansville. In fact, there is no such correlation. Thus, Vanco's most precipitous decline in Falls City sales over the 1972-77 period occurred in 1973, when its Falls City beer sales fell by nearly 60,000 cases compared to 1972. (DX 51, Pet. App. 54a, Tr. 701, 702.) Yet the Falls City f.o.b. price differential was precisely the same in 1973 as in 1972. Conversely, in

1975, when the Indiana-Kentucky price differential was much higher, Vanco's sales fell by less than 40,000 cases compared to 1974. (*Compare* DX 51, Pet. App. 54a, Tr. 701, 702, *with* DX 15, J.A. 186, Tr. 904.) Moreover, Vanco's contemporaneous explanation for the precipitous decline in its Falls City sales in 1973 cited various causes (*see* n.3, *supra*), but contained no reference to the price differential. Significantly, Vanco's sales of Anheuser-Busch beers increased in 1973 by 123,468 cases, or by approximately 124 percent over 1972 (PX 95, J.A. 145, Tr. 414, 415)—a gain that more than made up for the loss of Falls City sales. Hence, Vanco lost Falls City sales, not beer sales.

(3) *No reference to Henderson prices in setting Vanco's wholesale prices.* If the price differential were the cause of Vanco's Falls City sales loss, one would expect not only a correlation between the amount of the differential and the sales loss, but also a studied response on Vanco's part to the prices of Dawson Springs and other distributors in Henderson, Kentucky. Yet Vanco's principal testified that he set Vanco's wholesale prices to match those of the Evansville distributors of Sterling, Pabst and Stroh's, which he defined as his "competition." He could not even identify the Henderson wholesalers of competing beers, except for Dawson Springs. (DX 66, pp. 73-74, 85-87, J.A. 233, Tr. 985.) Further, Vanco's wholesale price changes were not correlated in timing or amount with those of Henderson County distributors. (DX 54, Pet. App. 59a, Tr. 709; DX 62, Pet. App. 60a, Tr. 717, 718.) [12]

(4) *The pivotal role of intervening pricing decisions.* To the extent that beer prices to ultimate consumers in Indiana and Kentucky were a function of independent pricing decisions by wholesalers and retailers in those

[12] Similarly, at the retail level, there was uncontradicted testimony by a Henderson County retailer that he did not take account of Evansville retail prices in setting his beer prices. (PX 215, pp. 10-11, Tr. 799-801, 815.)

states, Falls City's f.o.b. price differential could not be the cause of the retail price differences. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952); Rowe, *supra* n.8, at 186-87. Here, a critical intervening variable was Vanco's and Dawson Springs' wholesale pricing decisions. This is illustrated by their pricing in the summer of 1974, when Falls City increased its f.o.b. price by approximately the same amount to its Indiana and Kentucky distributors, leaving the f.o.b. differential virtually unchanged. (DX 15, J.A. 186, Tr. 904.) Vanco increased its wholesale price by more than the Falls City price increase, while Dawson Springs did not change its price. As a result, a great disparity developed between Vanco's wholesale prices and gross margins and those of Dawson Springs.[13] Significantly, the summer of 1974 was the only time during the 1972-77 period when there was evidence of any appreciable sales of Falls City beer in Henderson to Evansville consumers or of any advertisements by Henderson beer outlets in the Evansville newspapers.[14] The brief flurry of cross-over sales subsided by about September 1974, when Dawson Springs raised its wholesale prices without any concurrent change in the f.o.b. differential. (*See* DX 54, Pet. App. 59a, Tr. 709; DX 62, Pet. App. 60a, Tr. 717, 718; PX 194, J.A. 167, Tr. 822.)[15] Falls City cannot be held responsible for

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[13] On some major package sizes the difference between their wholesale prices amounted to more than twice the Falls City f.o.b. differential. (DX 54, Pet. App. 59a, Tr. 709; DX 62, Pet. App. 60a, Tr. 717, 718.)

[14] Both parties searched the files of the Evansville newspapers for beer advertisements by Henderson County retailers. The only such advertisements found and placed in the record of this case were from the July-August, 1974 period. (*See* PX 58-60, J.A. 136-138, Tr. 229, 230; PX 134, Tr. 560, 561; PX 135-136, J.A. 152-153, Tr. 561, 562; PX 138-139, J.A. 154-155, Tr. 565, 566; PX 140, Tr. 566; PX 216, pp. 3-5, 9-10, J.A. 170, Tr. 802, 815.)

[15] The cross-over purchases had only a temporary and minimal impact on Vanco and Dawson Springs: Dawson Springs' sales of

either Vanco's price increase or the concurrent decision of Dawson Springs to hold its price steady.[16]

The critical importance of independent pricing decisions is also established by a December 1976 survey of beer prices. At that time, when wholesale profit margins in Evansville and Henderson were similar, retail beer prices in Evansville and Henderson also were similar; in some instances retail prices for Falls City beer were actually lower in Evansville than in Henderson, notwithstanding the f.o.b. price differential. (DX 14, J.A. 182, Tr. 903; DX 54, Pet. App. 59a, Tr. 709; DX 62, Pet. App. 60a, Tr. 717, 718.)[17]

Falls City beer in 1974 increased by slightly more than 2,000 cases, an insignificant amount compared to Vanco's loss of over 43,000 cases. After 1974, Dawson Springs and Vanco lost Falls City sales at very similar rates. (DX 51, Pet. App. 54a, Tr. 701, 702.)

[16] The crucial importance of independent pricing decisions was also conceded by Vanco's principal, who attributed the cross-over sales in 1974 to Dawson Springs' independent decision to hold its own wholesale prices down. (J.A. 72-73; *cf.* DX 62, Pet. App. 60a, Tr. 717, 718.) This was, of course, contemporaneous with Vanco's decision to boost its own profit margin. (DX 54, Pet. App. 59a, Tr. 709.)

[17] The 1976 survey introduced by Falls City was the only documented survey of retail prices in the record. (DX 14, J.A. 182, Tr. 903.) Vanco did not introduce any documentary evidence into the record showing retail price levels in Evansville and Henderson throughout the relevant period. Thus, there was no documentary evidence to support the court of appeals' statement that "the relevant retail beer prices in Evansville were $.50 to $1.50 higher per case than in Henderson County during the relevant period. . . ." (Pet. App. 8a.) The purported $.50 to $1.50 price difference apparently stemmed from the vague testimony of one of Vanco's witnesses, testifying in 1979, as to his recollection of the difference in Falls City retail beer prices between Evansville and Henderson: "Oh, I'd say it would vary from fifty cents to a dollar and a half, I think at one time. I don't know." (Tr. 223.) The witness's testimony also made clear that the "one time" to which he referred was the unusual summer of 1974, when the Indiana wholesalers raised their prices but the Kentucky wholesalers did not. (Tr. 224-25, 229.)

(5) *Falls City's decline in central Indiana markets.* The finding of competitive injury is defeated by the uncontradicted evidence that Falls City's sales declined precipitously not only in Evansville, but also in central Indiana markets that could not possibly have been affected by the f.o.b. price differential. Thus, from 1972 to 1977, Vanco's Falls City sales fell by approximately 58 percent in Evansville (DX 51, Pet. App. 54a, Tr. 701, 702), while Falls City sales in Indianapolis declined by 60.87 percent; in Greenfield by 69.60 percent; in Lafayette by 64.21 percent; and in Muncie by 66.18 percent. For thirteen central Indiana counties as a whole, the decline was 60.74 percent. (DX 6, Pet. App. 55a, Tr. 899.) Thus, Falls City succumbed to the competition it faced from the major national brands in all of its markets, whether close to the Kentucky border or remote from it. The courts below did not mention, much less weigh and consider, this evidence.

(6) *Improper reliance on comparative rates of sales decline.* The court of appeals improperly compared Vanco's decline in Falls City sales to a statistical average of sales declines in Indiana as a whole. Because Vanco's rate of decline was somewhat greater than the state average, while Dawson Springs' rate was somewhat lower than the Kentucky average, the court concluded that the price differential must explain Vanco's rate of decline. (Pet. App. 8a-9a.) But to infer competitive injury from these percentage differences was implausible and improper, particularly in the face of the competitive facts just reviewed.

Using Vanco's sales as a basis for comparison allows Vanco to benefit from its own business conduct that hurt Falls City sales, such as Vanco's increased emphasis, beginning in 1973, on Anheuser-Busch's products and its 1974 decision to escalate its gross profit margins at a time

when Dawson Springs kept its margins low.[18] There is, in any event, no reason to expect that a beer's sales performance will be the same in all markets. It is more appropriate to test the effect of the price differential by comparing Evansville to similar cities remote from the state line. The equally precipitous decline of Falls City beer sales in major central Indiana cities demonstrates the fallacy of attributing Vanco's sales decline to the Indiana-Kentucky price differential. As in those other markets, the most plausible explanation for the sales decline was the simple fact that Falls City was a dying brand. It was the impressive growth of the major brands in Evansville, aggregating approximately one and a half million cases in increased sales over the relevant period (DX 9, Pet. App. 56a, Tr. 900, 901), and not diversion of sales to Henderson County,[19] that accounted for Vanco's drop in Falls City sales.

B. There Is No Basis For A Presumption Of Injury Arising From The *Morton Salt* Decision

The court's failure even to consider the foregoing undisputed competitive facts, and its erroneous conclusion that the price differential was the cause of Vanco's decline in Falls City sales, must be attributed to its improper interpretation of *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (Pet. App. 7a-9a.) The Seventh Circuit

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[18] Unlike the court below, the Court of Appeals for the Fifth Circuit in *Chrysler Credit Corp.* rejected plaintiff's business decline as proof of competitive injury because the evidence showed that other factors, including plaintiff's independent decision to "forsake[] the new car market to some extent to pursue fleet sales" had contributed to the decline. 670 F.2d at 581.

[19] It is ironic, to say the least, for the court below to have relied upon an allegedly slower rate of sales decline in Henderson County, for there was no proof whatever of any material sales *increase* resulting from diversion of business to Dawson Springs. Indeed, subsequent to 1973 and 1974, which were skewed by Vanco's own business conduct with respect to Falls City beer, Falls City sales fell by virtually the identical rate in Henderson County as in Evansville. (DX 51, Pet. App. 54a, Tr. 701, 702.)

and some other courts[20] have been misled into viewing *Morton Salt* as creating a virtually conclusive presumption of competitive injury. But a reasonable application of *Morton Salt* must take into account the special facts before the Court in that case. The Court was presented with a quantity discount program that the respondent, Morton Salt, effectively made available only to the five largest retail grocery chains in the country. The Court found that those large chains were in direct competition with smaller grocery stores, that the price discrimination was both substantial and longstanding, and that the price discrimination gave the chains a decisive advantage over their smaller rivals. 334 U.S. at 41. These facts, the Court noted, closely resembled those that prompted enactment of the Robinson-Patman Act: "Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Id.* at 43.

To be sure, in *Morton Salt* the Court stated that Section 2(a) is satisfied by proof that there is a "reasonable possibility" that price discrimination will cause a substantial lessening of competition; and it observed that, in that case, the "quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale price." *Id.* at 47. But the Court stressed that its decision was based upon a review of the evidence. There was an extensive evidentiary record "largely devoted to [the] single issue" of "injury to competition" and the Court found that the Commission had gone further than required by statute in establishing actual competitive injury. *Id.* at 50.

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[20] *See, e.g., American Motors Corp. v. FTC*, 384 F.2d 247, 250-51 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968); *Moog Industries, Inc. v. FTC*, 238 F.2d 43, 49-51 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958).

We do not question the holding of *Morton Salt* on its special facts. The broad language of that decision, however, has been construed by some lower courts as creating a near-conclusive presumption of injury. *Morton Salt* and its progeny have, therefore, been the subject of widespread and mounting criticism. In its Report on the Robinson-Patman Act, the Department of Justice criticized the *Morton Salt* test for "creat[ing] a virtual presumption of illegality" once a disparity in price is shown. United States Department of Justice, *Report on the Robinson-Patman Act* 9 (1977). Not only is the requisite injury "proved by easily drawn inferences," *id.* at 10, but also it is extremely difficult to rebut. Hence, in the Department's view, "[t]he total effect of the majority of the secondary line cases is to create a virtually irrebuttable presumption that any price discrimination is injurious to competition." *Id.* at 14. Similarly, the ABA Monograph on the Robinson-Patman Act records the substantial and continuing criticism of the *Morton Salt* rule, and notes that "[s]ome commentators have indicated that limiting the applicability of the *Morton Salt* 'inference of injury' rule to systematic discriminations favoring large buyers would reorient the Act to its original objective in the secondary line context." ABA Monograph, *supra* n.8, at 103.[21]

An inference or presumption of competitive injury arguably may be appropriate when a court is presented with evidence of large buyer preference or, in primary-line cases, of seller predation. *See Chrysler Credit Corp.*, 670 F.2d at 581; Department of Justice Report, *supra*, at 290-91; C. Edwards, *The Price Discrimination Law*,

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[21] For similar critical views of other commentators, *see, e.g.*, C. Edwards, *The Price Discrimination Law* 627-28 (1959); *Report of the White House Task Force on Antitrust Policy*, 411 Antitrust & Trade Reg. Rptr. (BNA) pt. 2 at 19 (May 27, 1969), *reprinted in* 1 J. Reprints Antitrust L. & Econ. 633, 761 (1969); Rowe, *Section 2(a) of the Robinson-Patman Act: New Dimensions in the Competitive Injury Concept*, 37 A.B.A. Antitrust L. J. 14, 16 (1968).

627-28 (1959). But absent such facts, as the Fifth Circuit recently held on remand from this Court, *Morton Salt* and its progeny are simply "not relevant." *Chrysler Credit Corp.*, 670 F.2d at 581. In other fact situations, "[c]ourts must be careful in each case to distinguish between price differences which cause anticompetitive effects and those which reflect 'a desirable response to competition and considerations of efficiency.'" *Id.* at 580. This means, we submit, that a per se or presumptive rule of competitive injury is out of place and courts should be admonished to make a searching and balanced appraisal of the relevant competitive facts. *Sun Oil Co.*, 371 U.S. at 527.

Where large buyer preference or seller predation are absent, the court's analysis must inquire into the background and reason for the disputed price difference as this will materially affect the probable competitive impact of that price difference. *Cf. Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Likewise, it is important to determine whether the favored or disfavored purchasers are in direct price competition, whether profit margins are small, and whether the price difference is likely significantly to impair profitability and the ability of firms to compete. To the extent there is evidence, as there was here, of a sales decline, the court must determine whether the decline was caused by the price difference or by other market factors. Above all, the court must be satisfied that a finding of violation will serve "the broad purposes of the Robinson-Patman Act and the antitrust laws," which is "to encourage competition among buyers and sellers." *Chrysler Credit Corp.*, 670 F.2d at 580, citing *Great Atlantic & Pacific Tea Co.*, 440 U.S. 69 (1979).

In the present case, there is no basis for any presumption of competitive injury. It was erroneous to rely upon *Morton Salt* as the basis for an inference, adverse to Falls City, drawn from the mere existence of a price

differential between sales to Indiana and Kentucky wholesalers and Vanco's loss in Falls City sales. The evidence here is legally insufficient to support the lower court finding of competitive injury and, indeed, directly refutes any such finding. Accordingly, the holding that Falls City violated Section 2(a) of the Robinson-Patman Act must be reversed.

CONCLUSION

Falls City established a meeting competition defense as a matter of law. Further, the court's finding of liability under Section 2(a) rests on a misapprehension of this Court's holding in *Morton Salt* and is clearly negated by the undisputed competitive facts of this case. Accordingly, the judgment of the court of appeals should be reversed and the complaint dismissed.

DATED: May 14, 1982

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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No. 81-1271

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

I. INTRODUCTION

This is a "secondary line" price discrimination case brought under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) ("the Act"). For a period of at least nine years, defendant-petitioner Falls City Industries, Inc. ("Falls City"), a brewer, charged plaintiff-respondent Vanco Beverage, Inc. ("Vanco"), its Evansville, Indiana beer distributor, 10%-29% more for beer than Falls City charged competitors of Vanco located in that portion of Kentucky adjacent to Evansville. The trial court found that Vanco lost volume and profits as Indiana beer consumers responded to the consequences of Falls City's price discrimination by purchasing lower priced Kentucky beer, and the appellate court affirmed that finding.

At trial, Falls City's evidence was devoted primarily to attempting to demonstrate that Evansville, Indiana and Henderson, Kentucky did not constitute a single market for retail beer sales. Vanco introduced overwhelming evidence to the contrary, and further demonstrated that Falls City's price discrimination had caused Vanco a disastrous loss of volume and profits. Based on that evidence, both the trial and appellate courts found that the "competitive injury" element of the Act had been established.[1]

Both courts also held that Falls City had failed to meet its burden of establishing its "meeting competition" defense, and that Falls City's price discrimination was not the result of a good faith attempt to meet genuine price competition. The trial and appellate courts both concluded that Falls City's price differential resulted from its discriminatory price increases in Indiana initiated to maximize Falls City's

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[1]To establish a Robinson-Patman Act violation, the plaintiff must demonstrate seven elements: 1) the defendant was engaged in commerce, 2) that in the course of such commerce, 3) the defendant discriminated in price, 4) such discrimination was in sales of commodities of like grade and quality, 5) any of the purchases involved in such discrimination were in commerce, 6) the commodities were sold for use, consumption or resale within the United States, and 7) the effect of such discrimination "may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Falls City never disputed any of these elements except the fifth, which it did not press in the appellate court and is not now pursuing, and the seventh, which is commonly referred to as the "competitive injury" requirement. The district court explicitly held that Evansville-Henderson constituted a single market for the retail sale of beer and that Vanco was injured by Falls City's price discrimination within that market (Pet. App. 28a-29a). The appellate court affirmed these findings without dissent (Pet. App. 6a-7a).

profits, not from good faith attempts to meet competitive prices in Kentucky (Pet. App. 37a, 49a, 9a-10a).[2]

This case presents no conflict between enforcement of the Robinson-Patman Act and encouragement of vigorous price competition. Falls City's Robinson-Patman Act violation resulted from its refusal to compete on the basis of price. The type of price discrimination practiced by Falls City is recognized as anticompetitive by the same commentators that are critical of the Act in other contexts.[3] Affirmance of the judgments of the trial and appellate courts will enforce the Robinson-Patman Act's nondiscrimination requirement and will at the same time break the spiral of artificially high price increases in Indiana, to the ultimate benefit of consumers.

Falls City has asked this Court to review and overrule the detailed factual findings of the trial court, which findings were affirmed by the Court of Appeals.[4] Specifically, in the first question on which the writ of certiorari was granted, Falls City and the Amicus have, in effect, asked this Court to

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[2] Vanco will refer to the transcript and exhibits with the same abbreviations used by Falls City. The Brief for the United States as Amicus Curiae will be referred to as "Amicus br."

[3] Richard A. Posner, *Antitrust Law* 179-80 (1976) [hereinafter referred to as "Posner, *Antitrust Law*"]; Robert A. Bork, *The Antitrust Paradox* 382-401 (1978) [hereinafter referred to as "Bork"]; Richard A. Posner, *The Robinson-Patman Act* 5, 12-15, and Forward, by Yale Brozen, at 3 (1976) [hereinafter cited as "Posner, *The R-P Act*"]; *see* discussion *infra* at 37-41.

[4] Since neither party ever requested a jury, the case was heard by Hon. Cale J. Holder, who was appointed to the District Court for the Southern District of Indiana by President Eisenhower. This experienced judge, who usually sat in Indianapolis, also presided in the Evansville Division until October, 1979, when a resident judge was appointed to the Evansville Division. His findings of fact should not be set aside unless they are clearly erroneous, and due regard should be given his opportunity to judge the credibility of the eleven live witnesses. Fed. R. Civ. P. 52.

rule as a matter of law that Falls City's price parallelism with its competitors established the meeting competition defense. Falls City and the Amicus err in their assertions that the trial and appellate courts rejected the defense because Falls City used a price system. Neither opinion even mentions the term "price system." Falls City and the Amicus have simply ignored the real reason why the defense was rejected: the compelling evidence that Falls City was not engaged in genuine price competition.[5]

As to the second question on which the writ of certiorari was granted, Falls City persists in asserting that the appellate court merely inferred competitive injury, even in the face of massive and specific evidence of injury to Vanco, including the written reports of a Falls City sales representative which state that Vanco lost sales due to lower prices in Kentucky (PX 3, 11, 160, 184; J.A. 97-98, 157, 166). Alternatively, Falls City has asked this Court to excuse its violation because Falls City itself was experiencing business difficulties.

The evidence not only supports the conclusions of the trial and appellate courts, but clearly reveals that Falls City never even attempted to comply with the Robinson-Patman Act. In the first section of this brief, Vanco will summarize the evidence showing that (a) the relevant geographic market properly encompassed Evansville, Indiana and

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[5]The participation of the Amicus in this case is paradoxical. Assistant Attorney General Baxter has stated publicly that he "would not be at all distressed if the [Robinson-Patman] Act were repealed" *(Confirmation Hearing on William F. Baxter, Nominee, to be Assistant Attorney General—Antitrust Division: Hearing Before the Senate Committee on the Judiciary,* 97th Cong., 1st Sess. 27 (1981)), presumably because of his belief that "in many instances the . . . Act can work to the detriment of consumers by inhibiting pricing decisions that would be procompetitive. . . " *(id).* In its zeal to emasculate the Act, the Amicus has ignored the massive evidence in this case that Falls City was participating in anticompetitive pricing.

Henderson, Kentucky, and that Vanco was injured by Falls City's price discrimination within that market; (b) Falls City engaged in noncompetitive, cooperative price maximization with its competitors rather than competing on the basis of price; (c) Falls City was a substantial and successful brewer in the Evansville-Henderson market; and (d) Falls City, by far Vanco's most important supplier, was crucial to the financial success of Vanco's business. That evidence supports the factual findings of the trial and appellate courts. An extensive review of the evidence is necessary because Falls City has challenged these findings and has not submitted a fair summary of the evidence. The brief will also show that both courts were correct in their application of the law, and that this case is consistent with generally accepted principles of economics.

II. REVIEW OF THE EVIDENCE

a. Vanco was Injured by Falls City's Price Discrimination Within the Evansville-Henderson Market.

Falls City allocated Vanderburgh County, Indiana, to Vanco as its exclusive territory for the distribution of Falls City beer (PX 170; J.A. 162; PX 168-172). Evansville, Indiana, is located in the southern portion of Vanderburgh County, adjacent to the Indiana-Kentucky border. Vanco purchased beer from Falls City and re-sold it to beer retailers located in Vanderburgh County, Indiana (*id*). Vanco's closest competitor was Dawson Springs Beverage Company ("Dawson Springs"), which sold Falls City beer to retailers in Henderson and Union Counties, Kentucky. Henderson County is contiguous to Vanco's territory.

From at least 1970 through 1978, Falls City charged Vanco approximately 10% to 29% more than it charged Dawson Springs and other Kentucky distributors for the identical beer picked up in each instance by the distributors, F.O.B. Falls City's brewery in Louisville, Kentucky (PX 87;

J.A. 139-42).[6] By the laws of both Indiana and Kentucky, Indiana retailers were required to purchase beer from Indiana distributors, and Kentucky retailers from Kentucky distributors. However, beer consumers were free to purchase beer from the retailers of their choice.[7] Vanco contended that it competed with Dawson Springs and other nearby Kentucky distributors for the distribution of beer to consumers, through their respective beer retailers.[8]

At trial, Falls City focused almost all of its efforts on attempting to demonstrate that Vanco could not have been injured by Falls City's price discrimination because Evansville, Indiana and Henderson, Kentucky were not one retail market for beer.[9] As a corollary, Falls City attempted to

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[6] Because each distributor was responsible for picking up its beer at Falls City's brewery, Falls City sustained no shipping or other expenses that varied among its customers. Contrary to the suggestion of the Amicus that brewers had higher costs in Indiana than in Kentucky (Amicus br. 28), Falls City's President admitted that Falls City's costs were identical for sales to Kentucky distributors and Indiana distributors (Tr. 977; Tate Dep., PX 30 at 89).

[7] Indiana law prohibits consumers from importing more than one quart of an alcoholic beverage without a permit. Ind. Code §§ 7.1-5-4-1, 7.1-5-11-1 (1976). This law was generally not enforced. On one occasion, when consumer importation of beer became so notorious that it was reported in the newspapers, several consumers were arrested by the Indiana police. These arrests generated enormous controversy and no further arrests were made (Tr. 122-23, 135-36; PX 57; J.A. 134-35).

[8] Falls City conceded in its brief on appeal, and both the trial court and appellate courts concluded, that this competitive relationship, if established, would support a Robinson-Patman Act claim (Falls City's brief on appeal to the Seventh Circuit Court of Appeals at 22; Pet. App. 47a, 6a).

[9] Whether the Evansville-Henderson area was a single market for retail beer sales is an important part of the competitive injury element, since if it were not a unified market where Vanco (the disfavored purchaser) and Dawson Springs (the favored purchaser) competed, Falls City's price discrimination could not have injured

explain away the decline in Vanco's volume as being merely reflective of Falls City's own volume decline. However, Vanco established that Evansville-Henderson was a unified retail beer market and that Falls City's price discrimination caused higher retail prices for beer within the Indiana portion of that market as compared with the Kentucky portion of the same market. That retail price difference resulted in diversion of sales from Vanco's retailers to Kentucky retailers.[10] Vanco also showed that it was damaged because its efforts to help its retailer customers be competitive forced Vanco to reduce its margin to the point that it was consistently unprofitable.

The district court, in its findings of fact, considered the extensive evidence and concluded that Vanco had demonstrated the existence of a unified Evansville-Henderson market and that Vanco was injured by loss of volume resulting from diversion of retail purchasers to Kentucky and by loss of profitability resulting from Vanco's attempts to reverse the volume loss (Pet. App. 32a-37a, 42a-44a). The Court of Appeals affirmed these findings without dissent (Pet. App. 8a-10a).[11]

Vanco. On the other hand, since it was a unified market, it is very likely that price discrimination as massive and persistent as that engaged in by Falls City would cause injury to the disfavored purchaser.

[10]The Amicus candidly admits that Vanco was "indirectly injured because consumers of beer crossed the border to buy beer at lower retail prices in Kentucky" (Amicus br. in support of the Petition for Writ of Certiorari 6; *see also* Amicus br. 5, 8-9, 20).

[11]Some of the evidence supporting these conclusions included a map of the Evansville-Henderson area showing that the two centers, separated only by the Ohio River, were joined by a heavily-traveled federal highway (PX 35A; J.A. 130). Witnesses described downtown Henderson and downtown Evansville as being about five miles, or ten minutes, apart (Tr. 111; Schmadel Dep., PX 66 at 77; J.A. 234). The General Manager of the local radio station testified that from some areas of Evansville it was almost as easy to get to a Henderson shopping center as to get to the major

The most striking evidence that part of Vanco's decline in volume was attributable to lower Kentucky retail prices is found in Falls City's own documents admitting that fact:

> [Vanco's] sales for the month of July are off over 9,000 cases from last year's sales. Part of this decrease is due to lower prices in the Kentucky markets.... (PX 184; J.A. 166.)
>
> . . . .
>
> Sales in the Henderson [Kentucky] market are up the last two months. Some of this increase is due to the price increase in the Evansville [Indiana] area.... (PX 160; J.A. 157.) (See PX 3, 11; J.A. 97, 98 to the same effect.)

The loss of volume by Indiana retailers to lower-priced Kentucky retailers was so notorious that it was reported in the Evansville Press (Tr. 114-22, 128; J.A. 26; PX 57; J.A. 134-35). According to those articles, some brands were more than $1.00 per case cheaper in Henderson, Kentucky than in Evansville, Indiana. The reporter who had written the articles testified that at one point the Kentucky *retail* price was lower than the Indiana *wholesale* price, causing some Indiana retailers to purchase beer for resale from Kentucky retailers (Tr. 128; J.A. 26). This was corroborated by advertisements by Kentucky retailers which appeared in the Evansville newspapers and which emphasized in bold type "*WE DO NOT* SELL TO LIQUOR STORES OR TAVERN OWNERS!" (PX 60, 136, 138; J.A. 138, 153, 154).[12]

Evansville shopping centers (Tr. 191-192; J.A. 26). James R. Duvall, a retired Senior Resident Agent in Evansville of the FBI testified that the Henderson area is considered a part of metropolitan Evansville (Tr. 244, 271-72).

[12] Further evidence of the lower Kentucky retail prices and resulting loss of volume by Indiana retailers was a survey of Evansville beer retailers who reported that they lost sales to lower priced Kentucky retailers throughout the relevant period (Tr. 302, 306-25; J.A. 34-45; PX 81-84). In addition, several witnesses testified to their personal knowledge of lower prices in Kentucky and

Witnesses also described "The Strip", a portion of the major north-south highway in Kentucky, just south of the Indiana state line and just north of Henderson, which contained ten to fifteen retail beer establishments (Powell Dep., PX 215 at 15; J.A. 168; Tr. 345, 516, 548-60, 630; J.A. 50, 65). Many of the retailers on The Strip had "drive in" windows so that consumers could buy beer without leaving their cars (Powell Dep., PX 215 at 15; J.A. 168; Tr. 558-59). Pictures of some of those establishments were introduced, including one with a sign proclaiming to Indiana-bound traffic, "Last Chance—Hot and Cold Beer To Go", and to Kentucky bound traffic, "First Chance—Hot and Cold Beer To Go" (PX 112-33; Tr. 548-60; J.A. 146-51; A-1 through A-6).[13]

Retailers on The Strip advertised their low prices in the Evansville media.[14] Witnesses testified to their observations on specified dates of cars with Evansville license plates parked at Kentucky carry-out retailers, whose drivers were

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the resulting increase in consumer purchases there, and one Evansville resident testified that he purchased beer in Kentucky because of lower prices there (Tr. 121-22, 218-22, 229; J.A. 29-32; Tr. 512-17, 629-34; J.A. 64-67).

[13] Since Falls City apparently was unable to produce clear copies of those pictures in the Joint Appendix, Vanco has reproduced those pictures in a short supplemental appendix bound together with this brief, and referred to as "A."

[14] Persistent advertising by Kentucky beer retailers in Evansville newspapers and electronic media was demonstrated by seven newspaper advertisements which quoted low Kentucky prices for Falls City beer, and radio advertisements which were read numerous times for several years, some proclaiming the sponsor to be the "largest in the Tri-State area" (referring to portions of Kentucky, Indiana and Illinois) (PX 58-60, 135, 136, 138, 139; J.A. 136-38, 152-55; PX 33, 33A, 36; J.A. 125-29, 131-33). Former FBI agent Duvall testified that Kentucky retailers advertised in the Evansville media throughout 1972-1978 (Tr. 336; J.A. 46). The manager of a large Kentucky beer retailer testified that his company also advertised on an Evansville television station (Powell Dep., PX 215 at 7-9).

seen to emerge carrying cases of beer (Tr. 86-112; PX 31; Tr. 629-32; J.A. 63-65).[15]

Certain statistical evidence corroborated this direct evidence of higher Kentucky beer prices diverting consumers from Indiana to Kentucky.[16] Falls City's own statistics show that during the 1972-1977 period, Falls City's sales declined in Kentucky and Indiana at approximately the same rate: 46% in Kentucky and 48% in Indiana (DX 16). However, during the same period, Vanco's sales declined 58%, while Dawson Springs' sales declined only 39%. In other words, while Vanco, previously Falls City's largest distributor and the best in Indiana, did worse than Falls City's average

[15] An extraordinary percentage of Dawson Springs' sales were of carry-out containers, whereas Vanco sold an unusually high percentage of containers used by bars and restaurants for on-premises consumption (PX 174; Tr. 535-36). An obvious explanation for this anomaly is that the carry-out trade was traveling to Kentucky for cheap beer.

[16] Additional direct evidence that Evansville-Henderson constituted one retail beer market included the testimony of the Advertising Director of the Evansville newspapers that Henderson is considered a suburb of Evansville, and is part of the same trading area (Fehn Dep., PX 216; J.A. 170). Documents were introduced showing that Henderson is included by the Federal Bureau of the Budget in the Evansville Standard Metropolitan Statistical Area, and that this designation could not have been made unless there was a very substantial flow of workers between Henderson and Evansville (PX 32; J.A. 121-24). A witness testified that many workers commuted daily between Henderson and Evansville to work in plants located in each area (Tr. 192-95; J.A. 27-28). A marketing expert testified that people normally can be expected to shop where they live or work (Tr. 195-96; J.A. 28-29). However, a great deal of testimony was introduced that consumers in the Evansville area travel to shop for better beer prices (Tr. 195-96, 218-22, 516-17, 629-32; J.A. 29-31, 50, 64-65). Ten of sixteen Evansville beer retailers surveyed stated that their customers traveled for cheaper beer (Tr. 308-24; J.A. 34-45). The President of Dawson Springs, Vanco's Kentucky competitor, agreed that consumers would travel long distances for cheap beer (Tr. 512-17; J.A. 50).

Indiana distributor, its Kentucky competitor, Dawson Springs, did better than the average Kentucky distributor and much better than Vanco.[17] (DX 51; Pet. App. 54a; Tr. 621-23).

The disparity in the sales volumes of Vanco and Dawson Springs is even more revealing when compared in relation to Falls City's price increases. On June 22, 1970, Falls City raised prices to Vanco but not to Dawson Springs (PX 111). Falls City did not change its prices again until December, 1973, when it again raised prices to Vanco without raising prices to Dawson Springs (PX 194; DX 15; J.A. 167, 186). In July, 1974, Falls City raised prices to both Vanco and Dawson Springs, but the increase to Vanco was larger *(id)*. The first year for which volume information is available is 1971. From 1971 to 1972, Dawson Springs' sales *increased* 35%, while Vanco's sales declined 12.5% (PX 168; DX 43). In 1973, Dawson Springs' sales declined by just 2%, while Vanco's sales declined 17%, and in 1974 Dawson Springs' sales *increased* 3.5%, while Vanco's sales declined 15.4% (DX 51; Pet. App. 54a). Considering that Falls City's Kentucky sales declined each year throughout the 1971-1974 period, including a decrease of over 12% in 1974, Dawson Springs' successes were truly remarkable (DX 16).

The reason the retail price of Falls City beer was higher in Evansville than in Henderson was Falls City's discrimination in price between Vanco and Dawson Springs. The Evansville beer retailers charged as little as they could to remain profitable. One Evansville retailer testified that

[17] Falls City has attempted to rebut these statistics by choosing some counties in central Indiana which experienced similar declines in sales. However, sales declines in other markets do not explain the great disparity in the rates of decline of Vanco and Dawson Springs when the two distributors were in adjacent territories in the same market. Furthermore, Falls City actually complained to Vanco in 1973 of the decrease in Vanco's sales "while our Falls City sales experience for the same period of time in the rest of [Indiana] is much better" (DX 1; J.A. 179).

despite complaints from his customers and a loss of sales to Kentucky retailers, he could not reduce his prices because of the high price he paid for beer (Tr. 218-22, 229; J.A. 29-32).[18]

Similarly, Vanco charged as low a price as it could, sometimes reducing its prices to an unprofitable level in an attempt to maintain volume. Vanco could not be profitable unless it resold its beer at a 27% mark-up or "gross profit margin" (Tr. 411; PX 88 at 3). That gross margin had to be large enough to cover Vanco's costs other than beer, such as salaries, warehouse maintenance , financing, maintenance of delivery trucks, gasoline and other expenses. Vanco's efficiency in controlling these costs was testified to by its independent accountant and by Falls City's own internal documents, which cite Vanco as the best beer distributor (of any brand) in Vanderburgh County (Tr. 399; J.A. 47; PX 170; J.A. 163; PX 168, 169, 171, 172).

During 1972 and 1973, Vanco kept its gross margins below those of Dawson Springs, but still could not match Dawson Springs' prices because Vanco paid so much for its beer (DX 54, 62; Pet. App. 59a-60a). Vanco's gross margin was then approximately 24% and it suffered losses of $72,448 in 1972 and $4,681 in 1973 (PX 88; J.A. 144). In December of 1973, Vanco concluded it could not sustain further losses and that it would have to raise prices to regain profitability (Tr. 655). However, from December of 1973 to December of 1975, Falls City raised Vanco's prices three times while increasing Dawson Springs' prices only twice (DX 15; J.A. 186). Vanco could offset these new increases only by increasing its own prices. It did so, and achieved modest profits of $16,510 in 1974 and $4,268 in 1975 (PX 88; J.A. 144). However, this

[18] Vanco's President stated that specific named retailers complained to him that they could not compete effectively with Kentucky retailers because of the high cost of beer to them (Schmadel Dep., DX 66 at 92-93; J.A. 235). Even the Presidents of Falls City and Dawson Springs testified that it was very important for a beer distributor to be able to offer competitive prices to its retailers (Tr. 520; J.A. 51; Tr. 977; J.A. 96).

effort on Vanco's part to maintain profitability resulted in dramatically different retail beer prices in Indiana and Kentucky, which were widely advertised and reported, and in consequent loss of volume by Indiana retailers and Vanco (see discussion *supra* at 8-11). In an attempt to regain this volume, Vanco reduced its prices in July, 1976 to their 1974 levels, absorbing Falls City's July, 1974; December, 1974; and January, 1976 price increases, as well as all of Vanco's other post-1973 cost increases (Tr. 753-55; J.A. 78-80; DX 15, 54; PX 186; Pet. App. 59a).[19] Falls City *never* made a similar price reduction in an effort to meet competition (*id.*). This reduction helped to slow the loss of volume, but it resulted in a margin of only 23.3% and a consequent loss by Vanco of $218,000. In 1977, Falls City again raised its prices and Vanco raised its prices by a lesser amount, again absorbing part of Falls City's increase. Vanco's margin in 1977, the last year for which financial information was available at the time of trial, was 24.8%, and it sustained a loss of $62,131 (*id*; PX 88, 95; J.A. 144-45). Vanco's accountant testified that, in light of Vanco's substantial reliance on Falls City, Vanco's absorption of Falls City's price increases had a detrimental effect on Vanco's financial statement (Tr. 417, 415; J.A. 48).[20]

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[19] This evidence shows that Vanco did adjust its prices to meet Kentucky competition, refuting Falls City's statement to the contrary (Br. 6).

[20] Evidence of the extent to which Vanco's business was damaged by the loss of volume and its absorption of Falls City's price increases was presented in the form of a valuation by Vanco's independent accountant based on a multiple of Vanco's average annual earnings. This valuation showed that Vanco's value declined by $766,000 between 1970 and 1978 (PX 88; J.A. 143). Furthermore, the President of Vanco stated that he was offered $1,300,000 for the goodwill of the business in 1973, and $1,100,000 for the goodwill in 1974, both of which offers he declined (Tr. 636-37; J.A. 67). In 1978, when he last discussed selling the business, Vanco's President was told that its goodwill was worthless (Tr. 638-39).

b. Falls City Did Not Compete on the Basis of Price.

The discriminatory prices which caused this injury to Vanco resulted from Falls City's decision to participate in cooperative price maximization in Indiana rather than to compete on the basis of price. The district court held:

> The discriminatory prices of defendant were not made in good faith to meet an equally lower price of a brewery competitor as found. The defendant raised its prices to wholesale distributors in the State of Indiana, which included the plaintiff. It was done to obtain more profit for defendant. This is not a lowering of the price to meet a brewer competitor's price within the teaching of Title 15 U.S.C. Section 13(b) and at the same time leaving the price lower than Indiana's price to Kentucky distributors of defendant's beer in Henderson County, State of Kentucky. The defendant's pricing policy, as found, was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers as the Kentucky competitors had all kinds of prices. The lower price accorded defendant's Kentucky distributors of beer in the relevant geographic market area was not the result of a threat from such Kentucky wholesalers and distributors that they would buy their beer from other brewers or from other brewers selling beer at a lower wholesale price unless defendant adjusted its wholesale price of beer. Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant set its Indiana price higher than its Kentucky price for the sole reason that it followed the other brewers, or leaders of other beers, for its profit. It was not meeting competition, its action was to get a higher price in Indiana than in Kentucky. (Pet. App. 49a.)

These findings were affirmed by the Court of Appeals (Pet. App. 9a-10a).

As described below, the evidence supporting the conclusions of both courts revealed conscious price parallelism between Falls City and its major competitors, involvement by Falls City and such competitors in the prices charged by their distributor-customers and resistance by Falls City and such competitors to equalization of Indiana and Kentucky prices. The evidence also showed that brands of beer that, unlike Falls City, did compete on the basis of price, experienced steadily increasing volume.

Falls City's Indiana prices were higher than its prices in any other state (Tr. 965-66; Tate Dep., PX 30 at 33). Falls City's competitors were the same in Indiana and in Kentucky: Pabst, Stroh's, Heileman (Sterling and Drewrys brands), Schlitz and Anheuser-Busch (Busch Bavarian brand) (Tate Dep., PX 30 at 23-24; Tr. 934-36, 966; J.A. 95).[21] The practice of charging Indiana distributors more than Kentucky distributors was virtually institutionalized among all of these brewers. There is evidence that the discrimination began prior to 1970, and Vanco believes that it is continuing even today (Tr. 543; DX 15; J.A. 54, 186-87). This institutionalized price discrimination never resulted in price reductions that benefited consumers. Falls City regularly raised prices to both Indiana and Kentucky distributors, with increases to Indiana distributors being larger and more frequent than increases to Kentucky distributors.[22] When

[21] Beer sales were heavily concentrated among Falls City and a few competing brewers, with four brewers accounting for 72% to 76% of total beer sales in Evansville, Indiana from 1972-1977 (DX 9; Pet. App. 56a). Falls City brands were the second largest in Evansville during 1972 and 1973, and remained among the top four sellers through 1976 *(id.)*. Five brewers accounted for 71% to 85% of beer sales in Indiana from 1972-1977, and Falls City was one of those five brewers from 1972 through 1974 (DX 12).

[22] From 1970-1977, Falls City increased its Indiana price seven times and its Kentucky price five times (PX 194; J.A. 167; DX 15;

Kentucky prices were increased, Falls City invariably increased Indiana prices on the same day (Tate Dep., PX 30, ex. 1-10, 13, 14; DX 15, J.A. 186-87).[22]

The President of Falls City admitted that the only reason for the price discrimination was price maximization in Indiana, in tandem with Falls City's competitors. When the district judge asked Falls City's President, James F. Tate, why Falls City's Indiana prices were higher than its Kentucky prices, Mr. Tate responded "because we followed the leaders, the pricing of the leaders of the beers in Indiana" (Tr. 948; J.A. 92). He further testified that when one of two competitors, Pabst or Stroh's, raised prices in Indiana Falls City would "follow them as quickly as possible" (Tr. 936; J.A. 87).

The available evidence, introduced by Falls City, corroborates Mr. Tate's statement that Falls City and its competitors raised prices virtually simultaneously. That evidence also shows, contrary to Mr. Tate's repeated testimony, that Falls City went beyond following price increases by leading at least one of the seven price increases

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J.A. 186-87). Even before that period, Falls City's Indiana prices had been higher than its Kentucky prices, by an unknown amount (Tr. 543; J.A. 54).

[22] Falls City has alleged, in essence, that there were independent price structures in Indiana and Kentucky resulting from state laws which prohibited sales by out of state distributors (Br. 3). The implication is that brewers merely followed, rather than caused, wholesale price changes. The absurdity of this argument is revealed by Falls City's policy of increasing prices in these allegedly "independent" markets on the same day, and by Falls City's failure to reduce prices in 1976 when Vanco reduced prices (DX 54; Pet. App. 59a). Further, there was absolutely no evidence introduced or discussed which ascribes different wholesale price structures to state law, and Falls City's price in West Virginia, which also had a nondiscrimination law (W. Va. Code § 11-16-13(a) (1974)), was lower than its Indiana price (Tr. 965-66; Tate Dep., PX 30 at 33).

during the relevant period, and by raising its prices in larger amounts than its competitors. During this relevant period, Falls City brands became more expensive than brands of Falls City's primary competitors.

The pattern of price increases during 1974-1976 is as follows:[24]

Date of Price Increase	Brand	New Price
July 5, 1974	Falls City	$3.90
July 8, 1974	Pabst	3.974
July 15, 1974	Stroh's	3.925
Date of Price Increase	**Brand**	**New Price**
December 30, 1974	Schlitz' Old Milwaukee	$4.014
December 30, 1974	Falls City	4.02
December 31, 1974	Busch Bavarian	4.054
Unknown, 1974	Sterling	3.974
Unknown, 1974	Drewrys	3.624

As a result of Falls City's participation in two 1974 price increases, one of which it led, its 1975 Indiana prices were higher than those of Pabst, Stroh's, Sterling and Falstaff, and 40¢ higher than Drewrys. The trend continued in 1976.

Date of Price Increase	Brand	New Price
January 1, 1976	Pabst	$4.054
January 1, 1976	Busch Bavarian	4.174
January 2, 1976	Falls City	4.12
January 12, 1976	Falstaff	3.91
January 26, 1976	Stroh's	4.005
January 26, 1976	Sterling	4.094
	Drewrys	3.624 (no change)

There was an obvious alternative to Falls City's cooperative price increases in Indiana, which was to engage in price competition. If Falls City had simply refrained from increasing its Indiana price on two occassions, in December,

[24] This price information is taken from Falls City documents prepared in 1975 and 1976 (PX 231). The prices quoted are for the most popular carry-out package, a case of four 6-packs of 12 oz. cans.

1973 and July, 1974, Falls City's Indiana prices and its Kentucky prices would have been almost equal and Falls City would have been priced in Indiana below Pabst and Stroh's, its primary competitors (PX 231; DX 15; J.A. 186). In its brief, Falls City argues that such a price reduction was "neither realistic or practical" and that it was an "impossible choice" because it would have involved "ruinously cutting its prices" (Br. at 12, 16).

However, the evidence shows that brands of beer that competed on the basis of price did exceptionally well in Indiana, and that Falls City was well aware of the success of the price competitive brands.[25] During 1974, when prices in Indiana increased dramatically and Vanco raised its Indiana prices twice, Drewrys became a "price beer" simply by increasing its price minimally and then maintaining it in the face of further subsequent price increases by the other brands. The effect was dramatic. In August, 1975, the Falls City sales representative wrote to Falls City's Vice President of Sales that "Drewrys is dominating the market at this time.... The other price beers are moving up too but not to the extent that Drewrys is. Economy priced beers are amounting to an estimated 35% of the Evansville sales at this time" (Peter Dep., PX 219, ex. 7). By November, 1975, Drewrys had become the largest selling brand in Evansville (PX 222; *see also* PX 162, 221, and 223), but Falls City refused to meet Drewrys' price competition.

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[25] In early 1972, Falls City's Vice President of Sales received a sales report about Evansville which warned that "the price beers are firmly entrenched and we will have to contend with them from now on" (DX 50). A report written in May, 1972 comments that an Evansville retailer reported "that his price beer business continues to increase" (Peter Dep., PX 219, ex. 16). A year later another memo states that "20% to 25% of the [Evansville] market is considered price beers. . ." (*id.*, ex. 18). In mid-1973, Falls City's Vice President of Sales acknowledged in a letter to Vanco that part of Vanco's decrease in volume was attributable to "the increased popularity of 'price beers' " (DX 1 at 1).

As late as February, 1974, Falls City had charged lower prices than Drewrys. It was Falls City's subsequent large price increases in Indiana that priced it out of the market. In fact, if Falls City had merely charged the same prices in Indiana as it did in Kentucky, it would have undersold Drewrys at least through January, 1977, and possibly longer. (Compare PX 231 with DX 15 and J.A. 186-87.) Falls City's President Tate admitted that lower Indiana prices probably would have increased its volume, and that he chose not to price below the level of Falls City's competitors "as a matter of business practice" (Tr. 946-47; J.A. 90-91). That practice consisted of cooperating with Falls City's principal competitors.

When Vanco attempted to end Falls City's price discrimination, Falls City refused even to consider the issue and turned immediately to a trade association of its "competitors" for help. In 1973, Vanco asked Falls City to support a bill in the Indiana legislature that would have ended price discrimination by prohibiting brewers from charging higher prices in Indiana than in neighboring states. Vanco pointed out that the bill could allow Falls City to sell in the Louisville, Kentucky market at lower prices than those of Falls City's competitors. The President of Falls City informed Vanco that he was "not interested in being that kind of competitor" (Tr. 624-26; J.A. 61-62).[26] Vanco's President testified in favor of the bill at a subcommittee hearing, for which he was angrily chastised by the then President of Falls City (Tr. 762-63; J.A. 80). Falls City and its competitors fought the price equalization bill through their trade

[26] Falls City's comment that Vanco did not assert price discrimination as a reason for its declining sales in one 1973 letter to Falls City (Br. 24) is disingenuous at best. Mr. Schmadel, President of Vanco, testified specifically that "the Falls City brewery people did not want anything in writing on that subject" (Tr. 624; J.A. 61). Since the letter was written contemporaneously with Mr. Schmadel's efforts in support of the Indiana nondiscrimination bill, Falls City can hardly allege ignorance of Vanco's views.

association, the United States Brewers Association ("USBA"). The USBA vigorously resisted the price equalization bill through the testimony and efforts of David D. Finney, its Vice President and Regional Counsel (Tr. 650-52, 768-75; J.A. 70-71, 81-83).

Falls City also enlisted the help of the USBA in resisting this suit. On October 27, 1976, in an effort "amicably" to resolve Falls City's discriminatory pricing without litigation, Vanco's counsel sent Falls City a draft of a complaint that would be filed if Falls City refused to desist from its discriminatory pricing, but which did not charge that Falls City was conspiring with its competitors. This letter concluded "[i]n a good faith attempt to resolve this dispute, I suggest that your counsel contact me so that we can discuss this matter" (PX 28; J.A. 101).

On October 29, 1976, immediately on receipt of this letter, and without responding at all to Vanco's complaint, Mr. Tate, Falls City's President, forwarded to Mr. Henry B. King, President of the United States Brewers Association, "a Xerox copy of all the information we have received from Mr. John T. Cusack." Mr. Tate's letter then went on say that he had sent this information to Mr. Shelton R. Weber, Falls City's general counsel, that "we would hope that you and your staff will work in concert with Mr. Weber" (giving him his address and telephone number) and concluded that, "[h]e will be delighted to send you or whoever you designate, any copies of correspondence with Mr. Cusack, and would likewise like to be kept abreast of any involvement by the United States Brewers Association" (PX 28; J.A. 100).[27]

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[27] Mr. Tate testified in his June 22, 1978 deposition that the United States Brewers Association "is a trade association of brewers that produce about 95 percent of the beer brewed in the United States," that he is a member of the Board of Directors of the USBA and that the chief executive officers of the major brewers are also on the Board of the USBA (Tate Dep., PX 30 at 18-19; J.A. 104).

Thereafter, Mr. Tate testified in his deposition that he discussed this lawsuit with Mr. King, that in 1977 "the suit was reported to the Board of Directors of the USBA" by him and that in substance he told the USBA Board "[t]hat we had this suit against us and I felt this was sort of a landmark case against the brewing industry in essence."[28] Mr. Tate, in his deposition, testified that Mr. August Busch, Jr. (of Anheuser-Busch), Mr. Murphy (of Miller), Mr. DeGuire (of Pabst), Mr. Schmidt (of Olympia), Mr. Stroh (of Stroh), and Mr. Peters (of Schlitz) were present at that USBA meeting, and that Anheuser-Busch and Carling asked for a copy of the complaint in this case, which he sent them (Tate Dep., PX 30 at 93-96; J.A. 110-112).

Mr. Tate, in his deposition, testified that subsequent to this USBA meeting he discussed this lawsuit with Henry King and Alan Rubin of the USBA because "[t]hey wanted to know the progress, keeping up with the progress that was going on in the case" and that Mr. King gave him encouragement in the defense of this lawsuit (*id.* at 98-99; J.A. 113-14). Mr. Tate then testified, in his deposition, that Mr. Thomas Austern of Covington & Burling, the USBA's law firm, examined the papers in this case and counseled Mr. Tate in connection with this lawsuit[29] (*id.* at 100-01; J.A. 114-15).

Mr. Tate, in his deposition, then testified that, besides the advice of Mr. Austern, "[t]here is possible help" from the USBA to help Falls City pay its legal fees, and that "I have requested same" from the USBA. He further testified that although such help is "non-committed," the Board of Directors of the USBA at the 1977 meeting had indicated

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[28] Mr. Tate had previously testified in his deposition that Falls City's leading competitors in Indiana and Kentucky were "practically identical" and they were Miller, Pabst, Stroh, Anheuser-Busch, Heileman, and Schlitz (Tate Dep., PX 30 at 23-24) and that these leading competitors sell beer at higher prices in Indiana than they do in Kentucky (*id.* at 86; J.A. 107).

[29] At this point in his deposition, Falls City's counsel instructed Mr. Tate not to answer any questions concerning communications between him and Mr. Austern or other attorneys at Covington & Burling.

"that they would consider it" (*id.* at 102; J.A. 115-16). Mr. Tate, in his deposition, also testified that "I have let them [the USBA] know what our attorney fees have been and that the clock is still running," that he discussed this lawsuit with Henry King of the USBA "sixty days ago" and that Mr. King "just asked me what our fees had been to this point and how it was coming, was any progress being made" and that he told Mr. King the amounts of Falls City's legal fees "by that time" (*id.* at 107-08; J.A. 118-19).

Following Mr. Tate's deposition, Vanco, on July 17, 1978, caused to have issued a subpoena to the USBA calling for any USBA minutes "with regard to this action." On July 24, 1978, the USBA responded to this subpoena stating that "the USBA has no responsive documents to produce." However, at the final pretrial conference in this case, following Vanco's motion to compel the USBA to comply with Vanco's subpoena, the USBA produced a copy of the minutes of its July 5, 1977 Executive Committee meeting held in Chicago. This document states, in pertinent part, that:

> Thereafter, James F. Tate asked for USBA assistance in what he conceived to be an industry problem being litigated by Falls City Brewing Company in Indiana. After discussion, the USBA was authorized to consider possible means for assisting Falls City and to make available to Falls City the services of Special Counsel to assist him in his defense of the litigation. (PX 29; J.A. 102-03.)

Nothing in Mr. Tate's testimony at trial detracted from the inference in Mr. Tate's deposition that the USBA was paying, or was considering paying, all or part of Falls City's legal fees in this case and, at a minimum, was providing Falls city with services of its counsel.

There is still further evidence of Falls City's non-competitive behavior and lack of good faith. Falls City's General Sales Manager and Vice President of Sales admitted that Falls City personnel discussed prices with personnel of its competitors (Peter Dep., PX 219 at 25-26; J.A. 173; PX 231;

J.A. 178). [20] Similarly, when the district court asked Falls City's President why Falls City's Kentucky prices were higher than the Stroh Brewery Co.'s Kentucky prices, he explained that this was "because of the distance from Detroit [where the Stroh brewery was located] into Kentucky, and we [Falls City] were in Kentucky...." When the court asked why that made a difference, the reply was "[b]ecause of the distance, hauling." (Tr. 952; J.A. 94.) Thus, Falls City set its prices to be approximately equal to Stroh's prices *after* freight costs were included, and did not make use of the competitive advantage given by the closer location of its brewery.

The evidence established that Falls City and its competitors deliberately set prices higher in Indiana than in Kentucky and other states. Falls City's President Tate stated in his deposition, which was admitted into evidence, that he "guessed" all brewers charged higher prices in Indiana than in other states (Tate Dep., PX 30 at 106; J.A. 118) and that all of his competitors had lower prices in Kentucky than in Indiana (Tr. 945, 948-49; J.A. 90, 92). Indiana law required brewers to charge the same price to all distributors, but Kentucky law did not. Mr. Tate stated that it had always been Falls City's policy to charge one statewide price in every state in which Falls City sold beer, even where such pricing was not required, and that he had simply never reconsidered that policy (Tr. 932, 948; Tate Dep., PX 30 at 25,

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[20] Falls City and its competitors also engaged in price signalling, by announcing price increases several weeks before they took effect *(see, e.g.* Tate Dep., PX 30, ex. 1-14). The President of Falls City testified that information regarding such price increases was freely and quickly available (Tr. 935-36; J.A. 87). Price signalling has been recognized as one of the tools of price fixing. *(Wall Products Co.* v. *National Gypsum Co.,* 326 F. Supp. 295, 306-07 (N.D. Cal. 1971). Evidence that signalling was in fact used to facilitate price parallelism in this particular situation is found in Falls City's reduction of a price increase announced in December, 1975 to become effective the following month, apparently because that increase was not fully followed by Falls City's competitors (Tate Dep., PX 30, ex. 6, 12).

89; J.A. 85, 91, 104, 109).[21] Falls City's competitors, however, charged different prices to different distributors in Kentucky and other states (Tr. 948; Tate Dep., PX 30 at 87-89; J.A. 91, 108-09).

Further, no Kentucky distributor threatened Falls City with loss of its business if Falls City's prices were not lowered. Instead, Falls City and its competitors pressured distributors to price to their liking. A Falls City representative admittedly told the Evansville distributor for Falls City's new "Billy Beer" to price it at a "premium" level rather than the "popular" (lower) price the distributor had intended to charge. (DX 66 at 208-09; J.A. 239-40; Peter Dep., PX 219 at 35; J.A. 174). In 1973, when Vanco was considering a price increase to cover increased costs, Falls City threatened to "take away" any such increase with an increase of its own (Schmadel Dep., DX 66 at 118; J.A. 237; Tr. 653-54). Vanco's President testified that Kentucky distributors were under pressure from brewers to "price right," for fear of termination (Schmadel Dep., DX 66 at 209; J.A. 240).[22]

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[21] The reason for Falls City's single-price policy was explained by its President:

> It had been the policy of Falls City Brewing Company, they told me, as far back as it went: Just one price in every state.
>
> Q: Did you yourself consider whether that was an appropriate policy for Falls City to have?
>
> A: I thought Falls City had that policy for a long time, and I thought it was a little presumptuous for me to come in and, you know, try to change everything at one time.

(Tr. 932-33; J.A. 85). Mr. Tate had been President of Falls City for five years at the time of his testimony.

[22] Indiana distributors were protected from such pressure by a law which prohibited brewers from terminating their distributors except for cause. Ind. Code § 7.1-5-5-9 (1976).

c. Falls City Was a Leading Brewer in the Market, and Was Profitable.

Falls City's complaint that it was a "dying regional brewer" is belied by the evidence. From 1953, when Vanco's present management joined Vanco, until 1974, Falls City brewery had the second largest share of the Evansville market. In 1953, Sterling, a brewer located in Evansville, was first, with Falls City a close second (Tr. 619; J.A. 58).

In 1972, the beginning of the time period at issue in this case, Falls City was still the second largest brewer in the market, with 19.1% of the market share. Pabst had 30.0% of the market, and Heileman 17.3%. The next largest brewer, Falstaff, had 7% of the market. Thus, the market was highly concentrated, with the top three brewers accounting for 66.4% of the market, and the top four, 73.4%. Falls City was a market leader (see evidence summarized *supra* at 16-18). Falls City remained in second place in the market in 1973, then dropped to fourth when Drewrys became the largest selling brand in 1975 (PX 222). Falls City's market share continued to decline until in 1977 it was the sixth largest brewer, although even then it had 7.4% of the market. (DX 9; Pet. 56a.)

Throughout the period at issue in this case (1972-1978), Falls City was profitable every year except 1975. Aggregate profits for the period, from its brewing operations alone, were $1,603,690 (DX 17). In 1978, Falls City decided to change its business from brewing beer to trucking. It purchased Middlewest Freightways, Inc. for $4,270,813 in cash, and changed its name from Falls City Brewing Company to Falls City Industries, Inc. (DX 23, n. 2 to Consolidated Financial Statements). Falls City continues to operate its trucking business profitably.

In 1979, Falls City sold the rights to the names and goodwill of its brands to G. Heileman Brewing Co. ("Heileman"), one of its competitors, for $1,300,000. Heileman continues to brew Falls City brands. Falls City

also sold its brewing equipment in 1979 for $2,300,000. (Tr. 980.)

d. Falls City Was Vanco's Lifeblood.

Vanco was dependent on Falls City. Vanco distributed more Falls City beer than did any other distributor from at least 1963 through approximately the first half of 1973 (Tr. 622-23; J.A. 59-60). From 1953, when Vanco's present management became associated with the firm, through 1978, Vanco carried Falls City beer, the complete line of Anheuser-Busch products, and some imported beers, but Falls City was by far its most important supplier (Tr. 619-20; J.A. 57-59). In 1972, Falls City accounted for 77.3% of Vanco's sales (PX 95; J.A. 145), and even in 1978, Vanco sold more Falls City Beer than any other brand[23] (Tr. 657; J.A. 74).

In 1973, Anheuser-Busch introduced a new brand—Busch Beer—which was handled by its established distributors, including Vanco, Dawson Springs, and other distributors which also sold Falls City beer (Tr. 620; J.A. 58). Falls City's internal documents show that Falls City believed Busch Beer to be competitive primarily with Pabst and Stroh's, that Falls City recognized that its brands were Vanco's "bread and butter," and that Vanco's volume in Falls City beer had declined so drastically that Vanco could no longer break even selling primarily Falls City beer (PX 203; Peter Dep., PX 219, ex. 18). By 1977, the further decline of Vanco's sales of Falls City beer forced Vanco to spend $137,000 for the right to distribute Heileman brands including, ironically, Drewrys and Cook's, another successful "price beer" (Tr. 620-21; J.A. 58-59).

In the context of Vanco's dependency on Falls City, the consequences of its price discrimination became intolerable.

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[23] Some brewers brewed numerous brands, so that in the aggregate Vanco sold more of their beer, but brand for brand, Falls City Beer was always Vanco's most important.

SUMMARY OF THE ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED RULE 52 IN REVIEWING THE FACTUAL FINDINGS OF THE TRIAL COURT.

Rule 52 of the Federal Rules of Civil Procedure requires the reviewing court to reverse factual findings of the trial court only if they are "clearly erroneous." Both questions brought to this Court by Falls City present pure questions of fact. The Court of Appeals, as required by Rule 52, reviewed the trial court's factual findings and the record generally, and concluded that the fact-finder's conclusions were not "clearly erroneous."

II. FALLS CITY'S PARTICIPATION IN PARALLEL PRICING IS NO DEFENSE TO ITS PRICE DISCRIMINATION.

Falls City has presented this Court with a novel theory of the meeting competition defense which would allow the defense to defeat the Act's non-discrimination rule when it is needed most. Falls City's entire meeting competition defense rests on the purported "price system" that it assertedly adopted. What Falls City never clearly articulates, however, is that the "price system" was nothing more than the practice of Falls City and its competitors of charging discriminatorily higher prices in Indiana than in other states. Falls City argues that the mere fact that its discriminatory prices assertedly paralleled those of its competitors excuses its violation of the Act. In other words, what would have been illegal pricing by Falls City is made legal by the participation of its competitors. The meeting competition defense is intended to promote competition—not collusion—among sellers, by permitting them to defend against genuine price competition. Falls City's interpretation is contrary to explicit legislative history and prior holdings of this Court, and also to the economic policy underlying the meeting competition defense and the other antitrust laws.

III. THE APPELLATE COURT REJECTED FALLS CITY'S DEFENSE BECAUSE FALLS CITY FAILED TO ESTABLISH THE DEFENSE AS A MATTER OF FACT, NOT BECAUSE FALLS CITY UTILIZED A PRICE SYSTEM.

Both the trial and the appellate courts held that Falls City introduced no credible evidence that it was meeting price competition. They never even mentioned the phrase "price system," and did not hold that the meeting competition defense was unavailable to Falls City because Falls City was meeting any such price system. The rejection by both courts of Falls City's defense was necessitated by the total absence of credible evidence to support the defense. In fact, Falls City introduced no evidence to indicate that it even considered complying with the Robinson-Patman Act. Certainly it introduced no evidence showing that competitive pressure was responsible for its price discrimination. Falls City introduced no evidence of price competition in Kentucky, and very little evidence of what the Kentucky prices of other brewers were. It introduced no evidence to show that its pricing decisions were a considered response to competition, and in fact admitted that they resulted from a cooperative attempt to maximize profits.

IV. FALLS CITY HAS CITED NO PRECEDENT OR JUSTFICATION FOR RECOGNIZING ADOPTION OF AN "AREA PRICE SYSTEM" WITHIN A SINGLE GEOGRAPHIC MARKET AS A VIABLE DEFENSE.

The cases cited by Falls City and the Amicus to support their arguments that the meeting competition defense is available when the defendant has adopted a price system all arose in the context of either a quantity discount system or in cases where different prices were charged in different geographical markets. They have cited no authority supporting the adoption of a so-called area price system within a single geographic market. The legal and economic justifications for approving price systems in cases such as those cited by Falls City and the Amicus are inapplicable in cases

involving discrimination on a geographical basis within one market.

V. INJURY TO VANCO FROM FALLS CITY'S PRICE DISCRIMINATION WAS NOT PRESUMED, BUT WAS PROVED.

The evidence clearly established that Vanco lost volume because of Falls City's price discrimination, much of which was passed through as higher retail prices, causing consumers to patronize Kentucky retailers. Vanco also showed that in order to mitigate the loss of volume, it absorbed much of the price discrimination, which resulted in a further loss of profitablity. Vanco presented both direct evidence and statistical evidence, all of which was carefully considered by both the trial and appellate courts, that showed that although part of Vanco's decline may have been due to Falls City's loss of market share, a substantial portion of the injury Vanco suffered was demonstrably attributable to Falls City's sustained and substantial price discrimination. It is clear from the opinions of both the trial and appellate courts that they concluded on the basis of the evidence that Vanco was injured by Falls City's price discrimination, and that they did not merely presume injury.

VI. FALLS CITY'S POLICY ARGUMENTS DO NOT EXCUSE ITS VIOLATION OF THE ACT.

Falls City's violation of the Act is not excused just because the case does not involve a "large buyer" or because Falls City may have been suffering business difficulties. Nothing in the language of the statute or its lengthy history of judicial interpretation justifies engrafting such exceptions onto the nondiscrimination mandate of the Act.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED RULE 52 IN REVIEWING THE FACTUAL FINDINGS OF THE TRIAL COURT.

The Court of Appeals was bound by the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure in reviewing the factual findings of the district court. On the record presented on appeal, it would have been reversible error for the appellate court to reverse the district court on the grounds now urged by Falls City. *Pullman-Standard* v. *Swint*, 102 S. Ct. 1781 (1982).

Falls City's challenge to the decision of the Court of Appeals is based on two findings of fact made by the district court and affirmed on appeal: that Vanco was injured by Falls City's price discrimination and that Falls City's discriminatory prices did not result from its good faith attempt to meet price competition. Both of these are pure questions of fact, as to which the reviewing court is prohibited from making its own independent determination. *Pullman-Standard*, 102 S. Ct. at 1788-89. The question of injury to Vanco is indisputably one of fact. The Court of Appeals reviewed the district court's opinion, which had been annotated by Vanco to refer to the supporting evidence, and properly concluded, under Rule 52, that "[a]n examination of the annotated materials and the record generally has convinced us that the [district] court's findings are not clearly erroneous and that the record supports its conclusion that Falls City violated Section 2(a)" (Pet. App. 5a).

The question of whether the reason for Falls City's discrimination was its good faith attempt to meet competitive prices is also a question of fact. Good faith is a question of intent, which presents a "factual matter for the trier of fact." *Pullman-Standard*, 102 S. Ct. at 1790-91.[34] Congress clearly

[34] This Court has held that when the defendant raises the "meeting competition" defense, its motivation in establishing discriminatory prices is determinative of its good faith and the

intended the question of whether a defendant set prices in good faith to meet competition to be a question of fact,[35] and this Court has always so treated it.[36] Falls City now seeks to assert that the Court of Appeals made an error of law by holding that the "meeting competition" defense is unavailable in the context of a price system. As is fully discussed in Section III of this brief, the appellate court made no such ruling of law. Instead, it reviewed the factual findings of the district court supporting the ultimate conclusion that Falls City had not established the meeting competition defense, reviewed the record supporting those findings, and concluded that "[t]he district court therefore did not err in finding that Falls City had failed to meet its burden of showing that its discriminatory pricing was a good faith effort to defend against competitors" (Pet. App. 10a, citation omitted). This is precisely what Rule 52 requires of the Court of Appeals, and involved no error.

II. FALLS CITY'S PARTICIPATION IN PARALLEL PRICING IS NO DEFENSE TO ITS PRICE DISCRIMINATION.

a. Falls City's Price Discrimination Was Not a Defensive Response to Genuine Price Competition.

The "meeting competition" defense appears in Section 2(b) of the Act (15 U.S.C. § 13(b)): "nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." This defense was designed to encourage procompetitive, defensive responses by sellers, not to sanction cooperative price maximization. The defense allows sellers to respond to price competition from their competitors while nevertheless complying generally with the Act's non-discrimination require-

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availability of the defense. *Great Atlantic & Pacific Tea Co., Inc.* v. *FTC*, 440 U.S. 69, 83-84 (1979).

[35] 80 Cong. Rec. H. 9418 (1936), quoted *infra* in note 72.

[36] See cases cited *infra* at 33-34.

ments. It cannot be used to excuse precisely the unjustified, systematic discrimination by sellers between competing purchasers that the Act was designed to prevent.

The fundamental thrust of the Act is to require sellers to treat competing commercial purchasers within the same geographical market equally.[37] The purpose of this nondiscrimination law was to protect both purchasers and consumers by avoiding persistently higher prices to some commercial purchasers. It was believed that such price discrimination would threaten the ability of the disfavored purchasers to compete effectively, injuring their businesses and possibly reducing competition over the long term and that in any case such discrimination would result in higher prices to the consumers who depend on the disfavored purchasers.[38] Recognizing that the Act's nondiscrimination provisions could impede genuine price competition among sellers, however, the drafters added several mitigating provisions—among them, the meeting competition defense. That defense excuses price discrimination when it is shown to be a defensive response to genuine price competition.

The legislative history clearly shows that the meeting competition provision was designed to allow a seller to *defend* against price competition,[39] as Falls City concedes (Br. 11-12).

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[37] *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 519-20 (1963); *see also George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 254 (1929). The Senate Judiciary Committee described the "guiding ideal" of the Act as "the preservation of equal opportunity to all usefully employed in the service of distribution" (S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936)); and the House Judiciary Committee cast its goal in terms of "equality of opportunity in business" (H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936)).

[38] 80 Cong. Rec. 9415 (1936) (remarks of Rep. Utterback, Chairman of the House Conference Committee).

[39] 80 Cong. Rec. 9418 (1936) (remarks of Rep. Utterback, quoted *infra* at 42); *see also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 240, 246-47 (1962) [hereinafter cited as "Rowe"]; *The Basing Point Problem*, TNEC Monograph 42 at 139 (1941) (Statement filed by Walter T. Wooden, Ass't Chief Counsel and Hugh E.

This Court and other courts have always construed the defense to apply only to defensive price reductions by sellers. The defensive nature of the lower price has been tested by seeking certain indicia of price competition, such as statements by customers that they have been offered a lower price by a competitor, or other evidence of the appropriateness of the response to the perceived competitive threat.[40] *Great Atlantic & Pacific Tea Co., Inc.* v. *FTC,* 440 U.S. 69 (1979) (threat of loss of business of an important customer established the defense);[41] *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951) (evidence that lower price was necessary to retain customer and to meet equally low prices offered by competitors must be considered); *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945) (testimony of witnesses without personal knowledge who assumed or concluded that the price discrimination was justified by competition insufficient to establish the defense); *FTC* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 756 (1945) ("[T]he maintenance of a discriminatory and artificially high f.o.b. factory price in order to take advantage of the correspondingly high prices of a competitor . . . is not sufficient to justify the discrimination. . . ."); *Balian Ice Cream Co., Inc.* v. *Arden Farms Co.,* 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956) (finding that defendant was responding to chiseling cuts, special advantages and rebates given by competitors established defense); *American Can Co.* v. *Ladoga Canning Co.,* 44 F.2d

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White, Examiner, respectively, for the Temporary Nat. Economic Comm.).

[40] Thus, sellers may "meet" but not "beat" what they believe to be their competitors' lower prices (H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936); *FTC* v. *Sun Oil Co.,* 371 U.S. 505 (1963); *Standard Oil Co.* v. *FTC,* 340 U.S. 231, 247-48, n.14 (1951)). The response must be appropriately tailored to the competition. *Callaway Mills Co.* v. *FTC,* 362 F.2d 435 (5th Cir. 1966).

[41] The *A & P* case established that a seller's good faith belief that a defensive price reduction is necessary will satisfy the meeting competition defense, but it does not undercut the necessity of the price reduction being motivated by a defensive response to competition.

763, 767 (7th Cir. 1930) (defense not established because defendant's argument that it feared losing the favored customer was not supported by persuasive testimony).

As those cases clearly establish, the defense was intended to apply, and has been applied, when a seller has established a nondiscriminatory price schedule, and then *reduced* its prices to one or more customers in order to meet genuine price competition.[42] Falls City now urges on this Court a novel interpretation of the defense—that it should apply when a seller which charges discriminatory prices shows merely that the lower price was similar to prices charged by its competitors.[43] Falls City argues that the fact that the low price was not the result of a price reduction should not matter, since the economic effect of the price discrimination is the same whether it results from price reductions or selective price increases.[44]

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[42] *See also* 16D Von Kalinowski, *Business Organizations* § 32.02 [2] (1982).

[43] Falls City has not even established the factual basis for its theory, since it presented no convincing evidence that its Kentucky prices were similar to those of its competitors. See discussion *infra* at 50.

[44] This assertion is not true. For the purchasers it would be true only if one assumes that demand is inelastic. In any event, it is obviously untrue for the consumers who pay the resulting higher prices. To the extent the Robinson-Patman Act, through the meeting competition defense, encourages competitive price *reductions* it reinforces the other antitrust laws and benefits consumers. The defense should be confined to that or similar situations.

The beneficial effect of price competition even in an inflationary economy is apparent from *William Inglis & Sons Baking Co.* v. *ITT Cont'l. Baking Co.*, 668 F.2d 1014 (9th Cir. 1982), *aff'g in part and rev'g in part* 461 F. Supp. 410 (N.D. Cal. 1978), on which Falls City relies. In both *Inglis* opinions, it was specifically stated that the market was highly competitive. In *Inglis*, during a time period which overlapped the one at issue here, inflation not only did not increase prices, but price competition actually resulted in significant reductions in the price of bread.

This argument stands the statute on its head. It would allow the defense to defeat the nondiscrimination requirement of the Act any time the lack of competition allowed a seller to raise prices arbitrarily to some purchasers.[45] Falls City's argument would have some appeal only if the price discrimination could be shown to be the result of a defensive response to genuine price competition. A seller might, for example, prove that because of price pressure normal profit margins could be maintained only by raising prices and that it had raised prices generally in a nondiscriminatory manner, except to certain customers for whom the competition was so intense as to preclude the normal price increase. Perhaps then the defense could be established. However, not only did Falls City fail to show any such competitive circumstances, but the available evidence shows quite the contrary. Falls City's Indiana prices were clearly artificially high since they were, without any proffered justification, higher than in any of the other states where Falls City sold beer (Tr. 965-66; Tate Dep., PX 30 at 32-33; J.A. 105). Moreover, competitors who chose to compete on the basis of price, like Drewrys, thrived on what must have been a smaller

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[45] This Court grappled with a very similar problem in *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945). In *Staley* the lower costs to some purchasers which resulted from the basing point system were the same low prices charged by the defendant's competitors. This did not excuse the higher prices to other purchasers for, as this Court explained "[t]he statutory test . . . presupposes that the person charged with violating the Act would, by his normal, nondiscriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price." 324 U.S. at 754.

profit margin than Falls City's (PX 222). Finally, there was no evidence that Falls City's Kentucky price was abnormally low or that it would have been higher but for intense price competition.[46]

Thus Falls City's price discrimination clearly was not a defensive response to competition. In fact Falls City admitted that its discrimination, like that in *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), resulted solely from its desire "to take advantage of the correspondingly high prices of a competitor" (324 U.S. at 756). Mr. Tate, the President of Falls City, testified as follows:

> THE COURT: Well, the price is FOB and at your dock. Why is the Indiana price higher than Kentucky under the policy of your company?
>
> THE WITNESS: Well, because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned. (Tr. 948; J.A. 92; *see also* Tr. 936, 940, 947; J.A. 87, 88, 91.)

Since that Indiana price was indisputably, and without justification, the highest of any of Falls City's prices,[47] it is

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[46] Judge Swygert, in his dissent from the opinion of the Court of Appeals, assumed that "[c]ompetition among brewers in Kentucky, however, was evidently stiffer than it was in Indiana, for the prices charged by all brewers was lower in Kentucky" (Pet. App. 17a). There is no support for this assumption in the record. In fact, Falls City's President testified in his deposition that Falls City's competitors were "practically identical" in Kentucky and Indiana (Tate Dep., PX 30 at 24).

[47] Falls City's President admitted that in his deposition:

> Q. Is it a fact, sir, that the prices [at] which you sell beer to Indiana distributors are higher than any of your other prices?
>
> A. Yes, sir.

He also admitted that the costs of selling beer to Indiana and Kentucky distributors were identical (Tate Dep., PX 30, at 33, 89; J.A. 105, 109).

evident that the discrimination was not the result of defensive measures taken to meet competition, but of offensive and discriminatory price maximization in complete disregard of the requirements of the Act.

The result was exactly what one would expect and what the Act sought to prevent —damage to Vanco's business and the business of its retail customers, significantly higher prices to consumers in Evansville than in neighboring Henderson, and an artificial and inefficient disruption of normal consumer purchasing habits resulting from the different retail prices.

b. Economic Theory Supports Confining the Meeting Competition Defense to Defensive Responses to Price Competition.

The procompetitive effect of the meeting competition defense as it was conceived by its drafters and consistently construed by this Court and other courts is also supported by economic theory. Falls City's interpretation, on the other hand, would not only defeat the nondiscrimination provisions of the Act, but would also be anticompetitive.

The defensive response to competition contemplated by the meeting competition defense results in sporadic price discrimination, which is procompetitive. Sporadic price discrimination—adjusting prices from time to time to meet identified competitive pressure—encourages price competition and erodes prices to lower levels, all of which benefit the consumer.[48] Sporadic price discrimination is especially valuable in undermining oligopolistic discipline in pricing, in the following manner: an industry member grants a secret reduction to an aggressive buyer. Word of the reduction leaks out, perhaps when the buyer seeks similar reductions from other industry members. The other industry members match or undercut the original reduction, and price concessions

[48] R.A. Posner and F.H. Easterbrook, *Antitrust* 339 (2d ed. 1981); *see also* note 3, *supra*.

spread. List prices become increasingly unrealistic and are eventually reduced. As secret price shading occurs, sellers lose confidence in their rivals' willingness to cooperate toward a common price policy.[49]

This Court has recognized the value of sporadic price discrimination in undermining oligopolistic interdependence in pricing.[50] In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 457 (1978), this Court stated that discriminatory price concessions "provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense." The meeting competition defense has consistently been interpreted in a way that encourages price competition and prevents use of the defense as a means to collude in pricing. *Great Atlantic & Pacific Tea Company, Inc.* v. *FTC*, 440 U.S. 69, 80 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).[51]

However, persistent, systematic price discrimination of the type engaged in by Falls City has been recognized as being anticompetitive and as thriving in an oligopolistic situation. Leading economists and lawyer-economists state

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[49] F.M. Scherer, *Industrial Market Structure and Economic Performance* 324 (2d ed. 1980) [hereinafter cited as "Scherer"]. *See also* Posner, *The R-P Act, supra* note 3, at 12-15.

[50] Sporadic discrimination *may* occur in the context of a price system as it did in *Callaway Mills Co.* v. *FTC*, 362 F. 2d 435 (5th Cir. 1966). Conversely, persistent price discrimination may occur in the context individually set prices.

[51] In both the *A&P* and the *United States Gypsum* cases, this Court considered whether a seller hearing of an alleged price cut of a competitor should verify that price cut with the competitor before matching the price cut. In the A&P case this Court stated that it did not favor such exchanges of price information because such exchanges "would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers" and that price competition is more likely to occur where there is uncertainty about competitors' prices (440 U.S. at 80; *see also* 438 U.S. at 457-58).

that persistent and systematic price discrimination cannot exist in a price competitive market, because competitive forces will cause the price differential to be equalized.[52] Persistent and systematic price discrimination is recognized as anti-competitive, and economists and lawyer-economists consider it to be evidence of tacit or explicit collusion, or of market power.[53]

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[52] Scherer, *supra* note 49, at 323-24; Richard A. Posner, *Oligopoly and the Antitrust Laws, A Suggested Approach*, 21 Stan. L. Rev. 1562, 1578-79 (1969) [hereinafter cited as "Posner, *Oligopoly*"]; Bork, *supra*, note 3, at 388; II Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 514a, at 341-42 (1978) [hereinafter cited as "Areeda & Turner"].

[53] "Where there are rivals, no seller will be able to discriminate persistently, because his rivals will take away his disfavored customers (who pay a higher rate of return) with offers of slightly better prices. This process will continue until the rates of return to be had from selling to all customers are equal." Bork, *supra* note 3, at 388. "Discrimination . . . cannot be systematically and persistently employed in a competitive market; competition will prevent sellers from extracting disproportionate returns in some transactions for long." Posner, *Oligopoly, supra* note 52, at 1578-79. "Price discrimination in sales of the same product cannot last long in a competitive market ." Areeda & Turner, *supra* note 52, at 342; *see also* Note, *Meeting Competition Under the Robinson-Patman Act*, 90 Harv. L. Rev. 1476, 1482 n. 40 (1977), where the author, relying upon Posner, *The R-P Act, supra* note 3, at 10-12, states:

> Without some market discipline, a seller's discriminatory pricing scheme is susceptible to erosion by the undercutting of rivals; in addition, no single oligopolist can act alone to force competitors out of the market. Hence, successful maintenance of systematic discrimination often requires general adherence to a uniform discriminatory pricing pattern. Systematic discrimination thus is symptomatic of the more general problem of cartel pricing.

This Note was cited in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 455 n. 30.

It is exactly that sort of persistent, systematic price discrimination in which Falls City was engaged.[54] Here there was no sporadic price discrimination, there were no secret price concessions, there was no process which could lead to an erosion of prices. Instead, there was a disciplined and continuous upward price spiral. As admitted by Falls City, it was Falls City's policy to increase its Indiana price because Falls City believed that it was more profitable to increase its price in that state, along with most of its competitors, than to compete for volume by lowering its price or even by maintaining its existing price (Tr. 946; J.A. 90-91).[55] Certainty about rivals' prices was possible because the ground rules

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[54] The Amicus has conceded that "persistent economic price discrimination may constitute some evidence of collusion," but insists that no economic (as distinguished from legal) price discrimination was established in this case. Economic price discrimination, according to the Amicus, occurs when the prices charged the favored and disfavored customers "bear different ratios to the marginal costs of sales to those customers" (Amicus br. 29; *see also* Posner, *Antitrust Law, supra* note 3, at 62). Such "economic" price discrimination was proved in this case. The following deposition testimony of Falls City's President established that Falls City's costs for sales to distributors did not differ between Indiana and Kentucky:

> Q. Do you have any cost savings, Mr. Tate, in selling beer to Kentucky distributors over selling beer to Indiana distributors?
>
> A. No, sir.
>
> Q. The costs are identical, are they not, sir?
>
> A. Yes.

Tate Dep., PX 30 at 89, J.A. 109. Mr. Tate made the same statement at trial (Tr. 977; J.A. 96).

[55] As the district court concluded, whether or not Falls City's prices were commercially reasonable is wholly irrelevant to whether they constituted a violation of the Robinson-Patman Act (Pet. App. 50a). It would, no doubt, often be commercially reasonable to charge discriminatory prices. If it were not, there presumably would have been no need for the Act.

were clear—the President of Falls City testified that it was general industry practice to price higher in Indiana than in Kentucky. Price information was freely available (Tr. 935-36; J.A. 87; Amicus br. at 13-14) and in fact Falls City obtained some price information directly from competitors (Peter Dep., PX 219 at 26; J.A. 173; PX 231; J.A. 178).

The meeting competition defense, by excusing only defensive responses to genuine price competition, fulfills the purposes of the Robinson-Patman Act and simultaneously promotes the vigorous competition sought by the Sherman Act and other antitrust laws. Properly applied, the defense meets the objections voiced by some writers that the Act may have the effect of discouraging competition. In this case, the violation of the Act was facilitated by the lack of price competition. To apply the meeting competition defense here would be as anticompetitive as it would be discriminatory.

c. The Legislative History and Prior Decisions of This Court Establish that Mere Adoption of Competitors' Discriminatory Prices Does Not Establish the Defense.

Falls City has never clearly defined the "price system" it was assertedly adopting. Apparently the so-called "system" was nothing more than the custom of "competing" brewers systematically charging higher prices in Indiana than elsewhere.[56] The legislative history of the Act and its consistent

[56] These prices were artificially high. *See* discussion *supra* at 6 (note 6), 16-18, 23, 35-36. Falls City made no effort to show whether the "system" of higher Indiana prices existed before Falls City's participation in it, or whether Falls City itself was one of the originators.

Falls City has attempted to attribute the high Indiana prices to the Indiana non-discrimination law, which prohibited brewers from selling to Indiana distributors at different prices (Ind. Code § 7.1-5-5-7 (1976)). This law may have contributed to the problem in the sense that it reduced the ability of individual distributors to press for lower prices, thereby facilitating collusive pricing by

interpretation by this Court establish that mere adoption of parallel pricing is insufficient to establish the defense, because adoption of competitors' prices does not necessarily involve genuine price competition.

The legislative history clearly states that parallel pricing alone is not sufficient to establish the defense. "This [meeting competition] provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first. . . ." 80 Cong. Rec. H. 9418 (1936) (remarks of Rep. Utterback, Chairman of the House Conference Committee).

FTC v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), involved a similar attempt to invoke the meeting competition defense on the basis that the defendant's competitors were engaged in the same discriminatory practices. This Court succinctly disposed of that argument: "[T]he maintenance of a discriminatory and artificially high f.o.b. factory price in order to take advantage of the correspondingly high prices of a competitor. . . is not sufficient to justify the discrimination. . . ." 324 U.S. at 756. The appellate court correctly applied the *Staley* precedent in this case.

The Amicus has suggested that there is a "sharp contrast" between *Staley* and the present case because the district court dismissed Vanco's claim based on Section 1 of the Sherman Act (Amicus br. 19-20).[57] However, the *Staley* opinion clearly

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brewers. However, the fact that a law to prevent intrastate price discrimination may have inadvertently facilitated illegal interstate price discrimination cannot excuse the latter. Further, West Virginia also had a nondiscrimination law (W. Va. Code § 11-16-13(a)(1974)), yet Falls City's prices were lower in West Virginia than in Indiana. Falls City conveniently neglected to include West Virginia in its listing, in its Petition for a Writ of Certiorari, of the twelve states having nondiscrimination laws (Pet. 9).

[57] The basing point system adopted by the *Staley* defendant and its competitors was held to violate Section 2(a) of the Act in *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945), which was decided the same day as *Staley*. However, contrary to Falls City's flagrant misstatement (Br. 17), the decision in the *Corn Products* case did not

did not base the finding of a Robinson-Patman Act violation on a prior finding that the competitors' prices were illegal. If it had, cooperative violation of the Robinson-Patman Act that fell short of a Sherman Act conspiracy would be absolutely invulnerable, since each competitor could defend its discrimination by pointing to the conduct of the others. In this case, the district court's dismissal of the Sherman Act count did not entail a finding that there was genuine price competition between Falls City and its competitors. In fact, the district court found that Falls City priced similarly to its competitors, that Falls City and its competitors resisted Vanco's efforts to end discriminatory pricing in Indiana, that Falls City sought the assistance of its competitors in defending this suit, and that Vanco's competitors benefited from Falls City's pricing policies, to the detriment of Vanco, beer retailers and beer consumers (Pet. App. 45a-46a). The only reason the district court dismissed the Sherman Act count was that it concluded that there was insufficient evidence of express *agreement*, or of a *conspiracy* to fix prices or to monopolize (*id*). The fact that Vanco was not able to point to the smoke-filled room is clearly not inconsistent with the existence of interdependently motivated oligopoly pricing[58] or with using the evidence of artificially high oligopoly prices to expose Falls City's meeting competition defense as vacuous. In fact, the major brewers were continuously involved in the pricing practices challenged in this case and, through the USBA, in the defense of this lawsuit (see discussion *supra* at 19-22). Where, as here, discriminatory prices

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find or even mention any violation of Section 1 of the Sherman Act. Neither did the decision in *Staley*. Both cases were decided under the Robinson-Patman Act independently from any consideration of Sherman Act violations.

[58] Lawyer-economists have noted that the legal standard for proving a Sherman Act claim, which necessitates evidence of agreement, falls short of reaching situations which are economically indistinguishable but where the industry structure and history make explicit communications regarding prices unnecessary (Posner, *Antitrust Law, supra* note 3, at 40-41; Posner, *Oligopoly, supra* note 52, at 1578-87).

were cooperatively set, they cannot properly be characterized as meeting competition in good faith.[59]

The mere fact that Falls City's competitors may also have been charging more in Indiana than Kentucky therefore does not establish the defense. It was incumbent upon Falls City to show not mere price parallelism, but competitive necessity. Not only did Falls City fail to show such competitive necessity, but the available evidence shows convincingly that there was none. First, Falls City failed to establish any competitive pressure to match its competitors' prices in Kentucky.[60] Second, the evidence showed that it was the Indiana

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[59] The meeting competition defense may not always require a seller faced with genuine price discrimination to determine whether its competitors' prices are legal before meeting them. It cannot, however, excuse knowing participation in a discriminatory or illegal pricing pattern in the absence of genuine price competition, which is what occurred in this case. The question of the legality or illegality of the prices set by Falls City's major competitors is therefore not material to this case. If it were, however, there is evidence that those prices were illegal. As the legislative history (quoted *supra* at 42) contemplates, the illegality of the "competing" prices may result from their discriminatory nature. Here there has been no suggestion that the major competitors' prices, all of which were f.o.b. the various breweries, were any less discriminatory than Falls City's own. It is presumably this awareness that is responsible for the industry's wide-spread interest in and defense of this case.

[60] Falls City's statement that Judge Swygert, dissenting from the appellate court's opinion, "found that the lower brewery prices in Kentucky resulted from 'competitive forces that develop[ed] over the years' " (Br. 8) is disingenuous at best. Judge Swygert made no finding of fact that overruled the facts as found by the district court, but merely commented as a general proposition that "pricing policies are the result of competitive forces that develop over the years" (Pet. App. 16a). Neither Judge Swygert nor any other judge reviewing the case ever found that Falls City had established, as a matter of fact, that it was engaging in price competition.

prices that were artificially high, not the Kentucky prices that were unusually low.[61] Third, there is evidence that Falls City led at least one of the Indiana price increases and increased prices in larger amounts than its competitors, which further undercuts any implication by Falls City that the Indiana prices may have been normal, and the Kentucky prices unusually low.[62] Fourth, the little evidence that Falls City introduced tended to show that its Kentucky prices were lower than those of its competitors as of 1976.[63] Fifth, since it is undisputed that most of Falls City's competitors had different prices throughout Kentucky, whereas Falls City had only one price, there was no "price system" for Falls City to adopt. There is thus no justification for leaping from Falls City's assertion that its prices roughly paralleled its competitors' prices to the conclusion that those prices were competitively necessary,[64] and Falls City's reliance on parallelism with its competitors must fail.

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[61] *See* discussion *supra* at 6 (note 6), 23, 35-36.

[62] The only evidence Falls City introduced on this point related to 1976. *See* evidence summarized *supra* at 16-17.

[63] *See* evidence summarized *infra* at 50-51.

[64] Falls City has complained that Indiana's own nondiscrimination law left it no palatable alternative, since it would have had to lower its price to all Indiana distributors or raise its price in Kentucky to noncompetitive levels. The definitive legal answer to this plaint is the answer that this Court gave in a similar situation in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 131, n. 22 (1978): the existence of a state nondiscrimination statute cannot excuse violation of the Robinson-Patman Act. Both must be complied with, even if that means extending the statewide price into portions of adjoining states which are part of the same geographic market area.

On a practical level, Falls City's objection is nonsense. It had plenty of alternatives. Falls City was not required to equalize its price throughout Kentucky, but only with the area of Kentucky falling within a common marketing area with Evansville, Indiana. If it had chosen to do so by raising its Henderson price, that would hardly have been disastrous. The evidence shows that Falls City's

III. THE APPELLATE COURT REJECTED FALLS CITY'S DEFENSE BECAUSE FALLS CITY FAILED TO ESTABLISH THE DEFENSE AS MATTER OF FACT, NOT BECAUSE FALLS CITY UTILIZED A PRICE SYSTEM.

a. The Appellate Court Did Not Base Its Ruling on the Existence of a Price System.

Falls City and the Amicus have attempted to create a question of law for this Court to review that is simply not presented by this case.[65] They have asserted that the appellate court rejected the meeting competition defense because Falls City was meeting a price system rather than meeting individual prices of its competitors.[66] That is clearly not what the opinion holds.

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competitors generally charged higher prices in Henderson than elsewhere in Kentucky (DX 28; J.A. 188-232). Furthermore, a price reduction (or avoidance of a discriminatory price increase) by Falls City in Indiana, which would have been the much preferred course, might well have been followed by the other brewers. Even if Falls City's price were not followed, the experience of Drewrys (described *supra* at 17-19) demonstrates that the increase in volume resulting from a lower price would have more than offset the lower margin.

[65] It is not entirely clear why the Amicus supports Falls City's petition. The Amicus may believe that the Act is anticompetitive, and may therefore be seeking to broaden the available defenses as a way of weakening the Act. If so, the effort is misplaced, for this is one case where the Act and the procompetitive policies of the other antitrust laws are completely harmonious (see discussion *supra* at 37-41). More fundamentally, it is, of course, not proper for the Amicus to urge on this Court an interpretation of a statute which is contrary to legislative intent and longstanding judicial interpretation. To the extent the Amicus believes a change in policy is advisable, its recourse must be to the Congress.

[66] The Federal Trade Commission, which joined in the Amicus brief, appears to be confused not only about the facts of this case, but also about its own position regarding the viability of the meeting competition defense in the context of a price system. On

The appellate court was, of course, affirming the opinion of the district court. The district court gave six reasons for rejecting the defense, none of which touched on whether the defense was available in the context of a price system. Instead, the district court enumerated facts which indicated that price competition was lacking and that the discrimination was not a defensive response to competition.[67] The

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March 2, 1982, the Federal Trade Commission submitted a brief to a Federal Trade Commission Administrative Law Judge in *In The Matter of Boise Cascade Corporation*, Docket No. 9133. That case involves allegations that the defendant violated Section 2(f) of the Act by inducing price concessions illegal under Section 2(a) of the Act. To counter the meeting competition defense, the Federal Trade Commission argued, at 24-25:

> What is involved here is the formal pricing system of the manufacturers, not departures from that system to meet competitive situations. To accept a meeting competition defense under these circumstances would be tantamount to saying that if [the defendant] received discriminatory prices from only a few suppliers it is illegal, but if it received discriminatory prices from all suppliers then it is legal. Such an interpretation would emasculate the intent of the law. *See FTC* v. *Standard Oil Co.*, 355 U.S. 396, 401 (1958); *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 752-3 (1974).

This interpretation of the meeting competition defense is correct. Had the Federal Trade Commission been more conversant with the facts of the present case, it would have recognized that the defense is as inappropriate here as it assertedly is in the *Boise* case.

[67] The reasons given by the district court for concluding that Falls City had not established the meeting competition defense were: (1) Falls City's price discrimination did not result from lowering its prices to Vanco's competitor, but from raising them to Vanco, (2) these price increases were the result of Falls City's policy of following the higher Indiana prices of other brewers, (3) the purpose of Falls City's higher Indiana prices was to increase its profit, (4) Falls City had a policy of establishing a single price for each state in which it sold beer, but since its competitors did not have a single price in Kentucky it could not have been meeting any such price, (5) no Kentucky distributors pressured Falls City

appellate court introduced its own discussion of the meeting competition defense by summarizing three general principles from *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945): (1) the defense emphasizes individual situations rather than a general system of competition, (2) the defense is designed to allow the seller to defend against genuine price competition, and (3) the defense does not justify merely adopting a competitor's discriminatory pricing structure. The appellate court then went on to affirm the district court's rejection of the defense

> on the basis of [the district court's] findings that Falls City's discriminatory pricing resulted from price increases in Indiana, not price decreases in Kentucky, and that in setting its Indiana prices Falls City was simply taking advantage of its competitors' policies of charging higher prices in Indiana than in Kentucky and other states (Pet. App. 9a-10a).

Thus the basis of the appellate court's affirmance clearly was that Falls City's discrimination resulted not from a response to competition, but simply from a decision to adopt its competitors' artificially high Indiana prices.[42]

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to keep its Kentucky price low, and (6) Falls City did not even consider adjusting its prices on a customer by customer basis (Pet. App. 49a).

[42] The appellate court's quotation from the *Staley* holding, referring to the Act's emphasis on individual situations, cannot be read as a per se rejection of the meeting competition defense when the defendant adopts a competitive pricing system. Such a reading would make the court's discussion of Falls City's motivation and its taking advantage of its competitors' discriminatory policies completely superfluous. The appellate court's quotation from *Staley* clearly means that to establish the defense the seller must prove that adopting such prices was its good faith defensive response to the particular competitive situation confronting it.

This interpretation of the meeting competition defense is consistent with the FTC's previous characterization of the decision in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir.

Neither the trial nor the appellate court ever said that the defense was unavailable if the defendant was meeting genuine price competition in the form of a price system,[49] such as existed in *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966) or *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1982). Instead, both courts concluded that Falls City had failed to establish that it was engaged in a good faith attempt to meet price competition.

b. Falls City Failed To Introduce Evidence To Establish the Meeting Competition Defense.

Although Falls City included "meeting competition" as an affirmative defense in its Answer to Vanco's complaint, it introduced practically no evidence to support that defense, and in fact, failed even to attempt to develop it until after

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1955), *cert. denied*, 350 U.S. 991 (1956). The FTC described *Balian* as involving a situation where the defendant had cut prices in response to loss of customers to lower priced competitors, and that "[i]t was *in response to this particular and individual competitive situation* that the Court excused this price discrimination upon the theory of self-defense against competitive price attacks." Brief of the Federal Trade Commission in *Anheuser-Busch, Inc.* v. *FTC*, 265 F.2d 677 (7th Cir. 1959) at 44 (emphasis added), quoted in Rowe, *supra* note 39, at 239, n. 119. Thus even the FTC, which has joined in the Amicus brief, recognizes that there is no inconsistency between applying the meeting competition defense where the defendant has adopted a price system and insisting that the lower price be justified by the particular and individual situation confronting the defendant.

[49] One reason the appellate court did not address the "price system" issue explicitly is that the issue was never argued to that court. The only "price system" case cited to the appellate court was *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966), and Vanco distinguished that case on the basis of the defendant's clear evidence that its lower price was a considered response to real price competition. (See Vanco's brief to the Seventh Circuit Court of Appeals at 64-65.)

the trial.[70] The statute clearly places the burden of establishing the meeting competition defense on the seller.[71] Moreover, whether the defense has been established is peculiarly a question of fact.[72]

Yet Falls City introduced practically no evidence to support its halfheartedly proffered defense. It introduced very little evidence of the Kentucky prices of its competitors, and no evidence at all of the existence of price competition. One piece of evidence it did introduce consisted of one set of brewers' price schedules which were required by the Kentucky Department of Alcoholic Beverage Control (DX 28; J.A. 188-232). These schedules showed the prices brewers charged their Kentucky distributors at only one point in time—late 1972. The schedules reveal that at that time, Falls City's prices to its Henderson, Kentucky distributors were below the prices of some of its named competitors, and above those of others.[73] The schedules also show that most of Falls City's competitors, with the exception of Miller and Stroh's, charged, in late 1972, a variety of different prices to

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[70] Falls City's efforts at trial were directed almost exclusively to attempting to show that the Evansville-Henderson area did not constitute a single retail market for beer. It was only after it became evident that that argument had failed that Falls City began to argue that it was meeting competition.

[71] 15 U.S.C. § 13(b). *See also FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 758, 760 (1945).

[72] *Id.* at 752-53. The legislative history is also clear on this point. "[The meeting competition provision] leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. . ." 80 Cong. Rec. H. 9418 (1936) (remarks of Rep. Utterback, Chairman of the House Conference Committee).

The Amicus has conceded that "the competitiveness of pricing decisions must be evaluated as a question of fact" (Amicus br. 12).

[73] Falls City's Henderson prices were lower than those of Schlitz, Falstaff, Miller, Anheuser-Busch and Heileman (Blatz), and slightly higher than those of Stroh's and Pabst.

distributors in different areas of Kentucky, and that their prices in Henderson were higher than their prices elsewhere in Kentucky.[74] The only other Kentucky price information introduced by Falls City is a list of the prices of Budweiser, Busch, Stroh's, Falls City, and Pabst at one other point in time—December, 1976, and seven invoices of Anheuser-Busch to Dawson Springs during 1974-1977. Falls City's prices were the lowest, suggesting that it was "beating" rather than "meeting" its competitors' Kentucky prices. (DX 14; J.A. 182-85; DX 29-35). Obviously the reason Falls City did not introduce more evidence regarding Kentucky prices at other times during the six years at issue is that it would not have helped its case to do so.[75]

At trial, Mr. Tate, President of Falls City, testified that Falls City attempted to determine its competitors' Kentucky prices and to keep Falls City's prices in line with them. He placed special emphasis on the prices revealed in the price schedules required to be filed at the end of 1972, and the fact that Miller and Stroh's also charged a single state-wide price at that time.[76] Yet in his deposition, which was taken approximately a year before the trial and admitted into

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[74] Those brewers may have been seeking to avoid price discrimination between Henderson and Evansville.

[75] Falls City has now discovered a few cases in which, in totally different contexts (see discussion in Section IV of this brief), defendants successfully raised a meeting competition defense when they were utilizing so-called price systems. Falls City seeks to use those cases to create the absurd rule of law that if a defendant is using a price system, the meeting competition defense must be available to it, regardless of evidence (or lack thereof) of the defendant's good faith in adopting the price system.

[76] Tr. 947-53; J.A. 91-94. "The uncorroborated testimony of an interested witness may be disregarded when it relates to the subject matter of his interest and is contradicted by other disinterested testimony, including strong circumstantial evidence." *Shelco, Inc.* v. *Dow Chemical Co.*, 322 F. Supp. 485, 518 (N.D. Ill. 1970); *aff'd* 466 F.2d 613 (7th Cir.), *cert. denied*, 409 U.S. 876 (1972); *see also Ralston Purina Co.* v. *Hobson*, 554 F.2d 725 (5th Cir. 1977).

evidence, Mr. Tate testified that to his knowledge, prior to a recent price change by Schlitz, no brewer other than Falls City had charged a single state-wide price in Kentucky. He specifically testified that Stroh's did not charge such a single price.[77] Far from following the Kentucky prices of Falls City's competitors closely out of the competitive necessity of meeting them, Mr. Tate, who was responsible for Falls City's pricing policy, clearly had very little idea what the Kentucky prices of Falls City's competitors were until he prepared for trial. He also testified that Falls City had never been pressured by a distributor to keep its Kentucky prices low (Tr. 952, J.A. 94), further undercutting his allegation of competitive necessity.

Not only did Falls City fail to introduce any substantial evidence of what the Kentucky prices of its competitors were over most of the period in question, but it introduced absolutely no evidence of the competitive analysis that purportedly led it to conclude that keeping prices lower in Kentucky than in Indiana was competitively necessary.[78] In fact, the explanation Falls City offered for the difference in prices was that it "followed the [pricing of the] leaders . . . in Indiana"[79] (Tr. 948; J.A. 92) and that it set its prices higher in Indiana than in Kentucky "as a matter of business practice" (Tr. 947; J.A. 91).[80] Falls City never even alleged in its

[77] Tate Dep., PX 30 at 87-89; J.A. 108-109.

[78] In this regard the case resembles *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), in which, as described in F. Rowe, *supra* note 39 at 248, the meeting competition defense was rejected because of the defendant's "lack of diligence to ascertain just what competitive prices were being met."

[79] The evidence summarized *supra* at 16-18, however, shows that Falls City sometimes led the price increases in Indiana.

[80] Falls City apparently did very little analysis of what its prices should be. See for example, its President's explanation of the reason for Falls City's virtually unique single-price system for each state, *supra* note 31. The trial and appellate courts did not say that Falls City was required to establish prices on a customer by

pretrial memorandum that its price discrimination was necessary to meet competition.[81] Falls City simply disregarded the Robinson-Patman Act because it believed it would profit by doing so. The trial and appellate courts both correctly held that Falls City had introduced no evidence on which a meeting competition defense could be based.[82]

The first question on which the writ of certiorari was granted is therefore not presented by this case at all. However, even if the appellate court's decision could somehow be read to turn on the "price system" question, the result would nonetheless be correct for the reasons given in Sections II and IV of this brief.

IV. FALLS CITY HAS CITED NO PRECEDENT OR JUSTIFICATION FOR RECOGNIZING ADOPTION OF AN "AREA PRICE SYSTEM" WITHIN A SINGLE GEOGRAPHIC MARKET AS A VIABLE DEFENSE.

Even if the appellate court had rejected Falls City's defense on the ground that it involved a "price system," that conclusion would be correct in the particular circumstances of this case. As this brief has already established, in order to invoke the meeting competition defense successfully, a defendant shown to have violated the non-discrimination requirements of the Act must demonstrate that the violation resulted from its good faith attempt to respond to genuine price competition. In each of the "price system" cases cited by Falls City and the Amicus the defendants did establish,

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customer basis, but they were disturbed by Falls City's own evidence that it did not even *consider* how the discriminatory effect of its pricing policy might be mitigated.

[81] All Falls City has ever alleged in this regard is that its Indiana and Kentucky prices were roughly in line with those of its competitors.

[82] Both courts relied on evidence which affirmatively showed that the lower prices were *not* responsive to competitive pricing, and also remarked on the absence of contrary evidence (Pet. App. 9a-10a, 37a-38a, 49a).

as a matter of fact, their good faith responses to genuine price competition. Falls City, in contrast, failed to meet its burden on this crucial question of fact. Moreover, the nature of Falls City's so-called price system, which is radically different from those involved in the cases relied upon by Falls City and the Amicus, is itself evidence of the lack of price competition between Falls City and its competitors.

The cases cited by Falls City and the Amicus involve two different kinds of price systems: quantity discount systems, and "area price systems," in which the seller systematically charges different prices in different geographical areas (Amicus br. 6). Both of these types of systems may arise quite naturally as a result of a seller's attempt to meet price competition, as they did in each of the cases relied upon by Falls City and the Amicus. The "system" alleged to be involved here, however, is quite different. Although it is labeled an "area" system, Falls City's system differs importantly from the "area" price systems in the cited cases because it involves systematically bifurcating a *single* geographic market, for which there is no apparent legal or economic justification.

The case principally relied upon by Falls City is *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966), which involved not an "area" system at all, but a quantity discount system. In that case, the defendant's competitors had adopted their own quantity discount systems, and the defendant's customers threatened to cease purchasing from the defendant unless it matched its competitors' prices. Because the defendant sold a substantially smaller range of merchandise than did its competitors, in order to meet its competitors' prices on individual lines the defendant was compelled to adopt a system which in effect granted greater discounts relative to the total volume of purchases than did the systems adopted by its competitors. The FTC challenged the discount system adopted by *Callaway Mills* on the ground that it constituted not "meeting", but "beating" the prices

offered by its competitors.[83] After a careful analysis of the facts, the Fifth Circuit concluded that in the particular circumstances there presented, the system adopted by Callaway Mills, although different from the discount systems of its competitors, was carefully crafted to meet their prices, and that it had been adopted in good faith as a result of intense competitive pressure.[84]

The other cases relied upon by Falls City and the Amicus, primarily *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 668 F.2d 1014 (9th Cir. 1982) and *Balian Ice Cream Co., Inc.*, v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), involved so-called area price systems where different prices were charged in *different* geographical markets.[85] These cases have no relevance to a case like the present one, where the defendant has maintained discriminatory prices *within* the same geographical market, to the injury of its disfavored purchasers. In fact, the *Balian* court carefully noted that "there was not here involved a differentiation between purchasers from [the defendant] of goods shipped in interstate commerce *where the*

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[83] In the *Callaway Mills* case, neither the defendant's competitors nor its customers complained they were injured. All of the so-called "price system" cases cited by Falls City and the Amicus have involved FTC enforcement proceedings or were primary line cases. None has involved a secondary line case in which the plaintiff demonstrated that it was injured by the operation of the "system."

[84] *Callaway* is also instructive for the kind of factual showing that a defendant which was genuinely concerned about complying with the Act was able to make, in sharp contrast to the dearth of evidence produced by Falls City.

[85] All of the other cases cited by Falls City and the Amicus on the question of a price system also involved different prices in different markets.

purchasers were in competition among themselves" (231 F.2d at 368) (emphasis added).[86]

Closer analogies to the present case are *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945) and *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945). The basing point systems utilized by the defendants in those cases were "area price systems" which operated in such a way as to cause injury to the defendants' disfavored customers. Invocation of the meeting competition defense failed.

The kinds of price systems in the cases cited by Falls City and the Amicus are not inherently anti-competitive, but the one assertedly adopted by Falls City is. When competition among a seller's competitors has resulted in their adopting quantity discount systems, it is an appropriate competitive response for the seller to adopt its own discount system designed to meet the prices of its competitors. The very fact that the system involves a *discount* is some evidence of healthy competition. Similarly, it is an appropriate competitive response for a seller to meet the low prices of a competitor, as the sellers in *Inglis* and *Balian* did, by reducing prices throughout a geographical market. In both of these situations competition at the seller level is enhanced, and prices are reduced.

Falls City's so-called system of following its competitors' price increases in one portion of a unified geographic market has no such economic justification. The very fact that a whole group of competitors maintained two radically different prices *within* a single market is evidence of the absence of competition among them. "Price system" in this context is simply a euphemism for the very discrimination the Act was intended to prevent. Falls City and the Amicus have cited no authority or legal or economic justification for allowing adoption of a so-called "area price system" to establish the

[86] The *Balian* and *Inglis* defendants, unlike Falls City, presented overwhelming evidence that their price reductions were good faith responses to prior price reductions by some of their competitors.

meeting competition defense when that system results in different prices being charged in different portions of a single geographical market. Asserting such a defense is contrary to the purposes of the Act and should not be allowed to succeed.

The reasons given in Sections II through IV of this brief support the judgments of the trial and appellate courts that Falls City failed to establish the meeting competition defense. The opinion of the Court of Appeals on the first question on which the writ of certiorari was granted is therefore correct and should be affirmed.

V. INJURY TO VANCO FROM FALLS CITY'S PRICE DISCRIMINATION WAS NOT PRESUMED, BUT WAS PROVED.

The second question on which the writ of certiorari was granted involves whether Vanco established that competitive injury resulted from Falls City's price discrimination.

Falls City's argument appears to confuse several distinct concepts. The first involves what showing is necessary to establish a violation of the Act. The plaintiff must show either that the discrimination may substantially "lessen competition or tend to create a monopoly in any line of commerce" *or* that the discrimination may "injure, destroy or prevent competition with any person who . . . grants . . . the benefit of such discrimination, or with customers of [that person]."[87] As this Section of this brief will demonstrate, Vanco showed not just that it might be, but that it was in fact injured and prevented from competing with Falls City's favored purchasers. This established the "injury" element of the violation.

The second concept subsumed in Falls City's argument involves what showing is necessary for a private litigant to collect treble damages under Section 4 of the Clayton Act.

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[87] 15 U.S.C. § 13(a). Vanco was the customer of Falls City, the person who granted the benefit of the discrimination, and Vanco was injured and prevented from competing by that discrimination.

That section requires the plaintiff to prove that he has been "injured in his business or property by reason of anything forbidden in the antitrust laws. . . ."[88] Vanco's proof that it was in fact injured by Falls City's price discrimination demonstrated the requisite injury for purposes both of establishing that Falls City violated the Act and also that Vanco is entitled to damages therefor, because Vanco was injured in its business or property. Falls City appears to be suggesting that to establish "competitive injury" Vanco must show injury to competition generally. This is contrary to the clear language of the Robinson-Patman and Clayton Acts, and is unsupported by any authority. All Vanco was required to show by either Act was that it was injured by illegal price discrimination.[89] Thus, Falls City's arguments that it should escape liability because it was experiencing business difficulty itself and because its favored purchasers were not "large buyers" are irrelevant.

Even if this Court were to interpret the Act to require a showing of injury to the competitive system generally, Vanco made such a showing. The district court specifically found that Falls City's price discrimination had injured Vanco, its retailer customers, and beer consumers.[90]

This Section of the brief will first show that the appellate court did not merely presume injury from the price discrimination. It will then demonstrate that the findings of fact by the trial and appellate courts that Falls City's price discrimination injured Vanco were amply supported by the evidence.

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[88] 15 U.S.C. § 15.

[89] There can be no serious argument that the injury suffered by Vanco was antitrust injury. Vanco experienced precisely the sort of damage—loss of volume and profits—that the Act was designed to prevent.

[90] There was no dissent from the finding of injury by any member of the panel of the Court of Appeals, which affirmed the district court's findings of injury (Pet. App. 5a).

The final Section of this brief will address Falls City's arguments that it should be excused from liability for various policy reasons.

a. Neither the Appellate Court Nor the Trial Court Relied on Any Presumption of Competitive Injury.

Falls City has attacked the appellate court's citation of *FTC* v. *Morton Salt Co.,* 334 U.S. 37 (1948) as if that court's affirmance of the district court rested exclusively on a presumption of injury from the price difference. A review of the decision by the Court of Appeals clearly reveals that this is not so.[91] As the Amicus concedes, "the Court of Appeals reviewed the evidence in support of petitioner's claim that competition from major brands, not the price differential between Kentucky and Indiana, caused the competitive injury" (Amicus br. 9, n. 7). The appellate court rejected that evidence in light of Vanco's contrary evidence, not on the basis of any abstract presumption.

Falls City's allegation falls even wider of the mark when the appellate court's holding on the question of injury to business or property is taken into account. It is true that Section 2(a) of the Robinson-Patman Act prohibits discrimination which *may* cause competitive injury and that Vanco was not required to demonstrate actual injury to establish the violation. However, since Section 4 of the

[91] The appellate court explicitly affirmed, based on its own review of the record, the extensive findings of fact made by the trial court (Pet. App. 5a). The appellate court also independently summarized, without dissent, the evidence showing that Evansville-Henderson was a single geographic market for retail beer (Pet. App. 6a). The Court of Appeals concluded: "Moreover, there is testimony in the record to support the conclusion that the major reason for the higher Indiana retail beer prices was the higher prices charged Indiana distributors, and there is ample evidence, summarized by the district court, that the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail purchases from Vanco." (Pet. App. 8a.)

Clayton Act requires a plaintiff suing for damages to demonstrate that the plaintiff has actually been injured in its business or property as a result of the violation, Vanco was required to prove specific injury from the price discrimination in order to recover. Vanco did so. The appellate court approved, again without dissent, the district court's findings that Vanco was injured through lost volume and lost profits, and concluded that "[t]hese factors demonstrate the requisite causal connection between the illegal price discrimination and the injury suffered," citing *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969) (Pet. App. 10a). Thus even if the appellate court had relied on *Morton Salt* to satisfy the competitive injury element of Section 2(a), the effect would be completely eclipsed by the specific findings of that court regarding the far more stringent showing of actual damage required to satisfy Section 4 of the Clayton Act (Pet. App. 8a-10a).

b. The Facts Support the Finding that Vanco Suffered Competitive Injury.

It is not appropriate for Falls City to be challenging in this Court the factual findings of the district and appellate courts, but since it has, Vanco is compelled to answer. Each of the objections Falls City now levels against Vanco's evidence was argued by Falls City, vigorously, before both the trial and appellate courts, and rejected by both.[92]

Before answering each of Falls City's contentions, it is helpful to note that many of them are based on a gross over-

[92] Because the district court did not draw the conclusion advocated by Falls City from its consideration of all the evidence, Falls City asserted to the appellate court that the district court "refused to consider" Falls City's evidence (Falls City's brief to the Seventh Circuit Court of Appeals at 11). The Court of Appeals proceeded to review the record with care, and agreed with the trial court. Falls City now complains that the appellate court, too, "totally disregarded" Falls City's evidence (Br. 22). Falls City has had two fair chances to prove its case. To attribute its failure to arbitrariness on the part of the two courts that have patiently heard it is disrespectful to those courts, and to this Court as well.

simplification of Vanco's case. Falls City's arguments often imply that Vanco has sought to attribute all of the changes in the Evansville beer market to Falls City's price discrimination. Of course this would be absurd. There were other forces at work, most notably the increasing popularity of price beers and the brands of certain large brewers, and a loss of total market share by others, including Falls City. Similarly, Vanco faced competition on two fronts: from distributors of other beers in the Evansville area, and from distributors of Falls City beer in neighboring areas of Kentucky, who were buying their product much more cheaply. These facts were clearly recognized by Vanco and carefully explained to the trial and appellate courts.

Falls City's first contention is that Vanco could not have been injured by its price discrimination because the Evansville sales of the larger brewers, whose market share was growing at the time, increased even though those brewers were also discriminating in price between Evansville and Henderson. Obviously, one would expect the volume of the Evansville distributors of the more successful brands to increase as those brands increased their market share. Not everyone went across the river to buy cheap beer. However, any tangential relevance of the fate of the Evansville distributors of other brands to Vanco's case would have to be based on some showing that they suffered a price discrimination commensurate to that suffered by Vanco, and that it did not affect them. Such a demonstration might take the form of a showing that the relative rates of increase of those distributors, despite the price discrimination, was in proportion to the relative rate of increase elsewhere in Indiana and of distributors of the same brands in neighboring areas of Kentucky.[93] There was no showing of the amount or duration of price discrimination suffered by Evansville distributors of other beers, and no showing of the performance of those distributors relative to others in Indiana or in

[93] It is also likely that distributors of brands with a growing market share would be less likely to notice the impact of any price discrimination.

Kentucky. In fact, the growth of total beer consumption in Evansville increased at a rate 11% less than the rate of increase in Indiana as a whole (DX 11; Pet. App. 58a; DX 12). In addition, Falls City's comment that Vanco was not injured because its volume increased in 1977 and 1978 ignores the fact that this volume increase was purchased for $137,000, as Vanco found it necessary to take on Heileman brands to mitigate the loss of volume in Falls City beer (Tr. 620-621; J.A. 58-59). Vanco sustained a loss of $62,131 in 1977 (PX 88; J.A. 144).[94]

Falls City's second argument is that because there was not a direct correlation between Vanco's decline in volume and the amount of the price discrimination, the former could not have been caused by the latter. Vanco's evidence showed that Vanco was attempting to do a balancing act between, on the one hand, charging a price that would allow its retailers to price competitively and, on the other hand, maintaining a profitable margin (see evidence summarized *supra* at 12-13). This attempt to cope with Falls City' s p ice discrimination sometimes caused Vanco to reduce prices to unprofitable levels to stem the loss of volume. In this situation one would not expect a direct correlation between the amount of price discrimination and the loss of volume.[95] Furthermore, the

[94] The results for 1978 were not available when the case was tried.

[95] This is one reason that the measure of damages was complicated in this case, since it involved measuring loss of profitability as well as loss of volume, and calculating what part of those losses was attributable to the price discrimination rather than to other factors. The district court rejected Vanco's higher measure of damages based on decline in the value of its business (Pet. 44a). The court then simplified the estimate of the amount of damage by settling on a measure which is very conservative in this case—the amount of the price differential. The theory was that Vanco would have sold at least as much Falls City beer at the lower price its Henderson competitor paid as it did at the discriminatory price, and that Vanco would have been more profitable to the extent of the price difference. This is an exceedingly conservative measure

volume decline resulted from consumer response to the price differential, which of course is not immediate. It takes some time for consumers to become aware of price differentials and, once they have become accustomed to shopping for cheaper beer, more time to change buying habits.

Falls City next argues that because Vanco did not key its prices to those of its Kentucky competitors, it could not have been injured by those competitors. Vanco's President did testify that his Evansville competition for sales to Evansville retailers were the distributors of other brands, which is clearly true. This is not inconsistent with his further testimony that Vanco also competed against nearby Kentucky distributors of Falls City beer. Vanco's competition with Kentucky distributors was not generally for sales to retailers, but, through their respective retailers, for sales to consumers. Vanco's price changes did not correlate in timing and amount with the price changes of its Kentucky competitors because Vanco was doing its best to maintain its prices as low as possible, sometimes delaying or even reversing price increases required to maintain profitablity. (See evidence summarized *supra* at 12-13.[16]

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of damages because it ignores the fact that Vanco almost certainly would have decreased its prices to its retailer customers, which would have resulted in increased volume. Under the circumstances of this case, the district court was completely justified in using the price difference as a conservative estimate of Vanco's damages, and the damage award should have been affirmed rather than the case being remanded to the district court for a reconsideration of the amount of damages.

[16] In 1976, in order to reclaim volume lost to Kentucky retailers, Vanco reduced its price to its retailers to the level it had charged in 1974. This resulted in Vanco's absorbing price increases made by Falls City in 1974 and 1976, as well as increases in costs. (See evidence summarized *supra* at 13 and DX-54; Pet. App. 59a.) This is a dramatic example showing that, contrary to Falls City's unsupported allegations, Vanco did attempt to respond to Kentucky prices.

Next, Falls City asserts that "intervening pricing decisions" exonerate it from responsibility. As far as Vanco's own pricing decisions go, all of the evidence shows that Vanco's prices mitigated the effect of Falls City's discrimination. Vanco was acknowledged by Falls City as well as by its own accountant to be a very efficient distributor (see evidence summarized *supra* at 12). The evidence showed that Vanco required approximately a 27% margin to be profitable, and that over the period in question it consistently priced below this margin to attempt to cope with its Kentucky competition and with pressure from its retailers to keep its prices down (PX 88). Its mark-up, as a percentage of cost, on Falls City beer was generally similar to or less than that of its Kentucky competitor (DX 54, 62; Pet. App. 59a, 60a). To the extent Vanco had simply passed through Falls City's price discrimination, rather than absorbing a substantial amount of it, the impact on retail prices would have been far greater.

Vanco's retailers also made pricing decisions, but the evidence shows that they too tended to mitigate the discrimination. Vanco introduced evidence of its retailers' awareness of competition from Kentucky retailers and their complaints to Vanco that they could not compete effectively because of the high cost they paid for beer (see evidence summarized *supra* at 11-12). There was no evidence that the retailers set prices other than at the lowest possible level under the circumstances. In view of the fact that these retailers were clearly struggling with the consequences of Falls City's discrimination, Falls City's attempt to attribute the retail price difference to their pricir is baseless and illogical.[97]

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[97] Falls City's reference to its purported December, 1976 "survey" of retail prices is not helpful. First, to the extent that "survey" purported to show some lower retail prices in Evansville than in Henderson, it was in conflict with direct evidence that Evansville prices were generally substantially higher, including contemporaneous advertisements (PX 33; J.A. 125). The "survey" was totally lacking in foundation, most particularly as to the basis for choosing the three particular retail outlets in each state whose

Finally, Falls City objects to the use by the trial and appellate courts of statistical evidence showing that Vanco's rate of decline in Falls City sales was greater than that of the average Indiana distributor, and that the rate of decline of Vanco's Kentucky competitor was less than that of the average Kentucky distributor. Falls City's preoccupation with this evidence ignores the fact that the statistical evidence is merely corroborative of what Vanco had already established by direct evidence—that significant numbers of Evansville consumers were traveling to Kentucky for cheap beer (see evidence summarized *supra* at 5-11). Moreover, the decline in Vanco's volume was only one element of its injury. To the extent that Vanco absorbed a substantial amount of Falls City's price discrimination, the effect on the decline in volume was mitigated, and the effect on its profit margin exacerbated. With those caveats in mind, the statistics regarding the relative rates of decline are perfectly logical corroborative evidence. Falls City asserts that the rate of decline in a few central Indiana counties was at least as great as Vanco's, but it has given no indication of why those counties were chosen,[98] or of why the sales of Vanco's Kentucky competitor declined at a significantly slower rate than Vanco's.

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prices were cited. Second, to the extent any Evansville retail prices were lower than Henderson prices in December, 1976, that fact doubtlessly reflected the fact that Vanco had, in July, 1976, reduced its prices to its 1974 levels in an effort to reclaim volume (Tr. 753-54; J.A. 78-80). In that attempt it was successful, but at the cost of a $205,229 loss. Thus Falls City's evidence, to the extent it is credited, establishes that far from making independent decisions that caused the retail price differential, the Evansville retailers were eager to and did compete by reducing prices whenever possible.

[98] In some of those counties, at the beginning of the relevant period the distributor sold only minimal amounts of Falls City beer (e.g. 7,896 cases in Greenfield County in 1972). One of those distributors stopped carrying Falls City altogether, probably because the overhead costs associated with carrying such a slow-selling brand makes it uneconomical. This decision translates into

The factual conclusions of both the trial and appellate courts are thus well-founded, and Falls City's attempt to reargue the facts in this Court is misplaced.

VI. FALLS CITY'S POLICY ARGUMENTS DO NOT EXCUSE ITS VIOLATION OF THE ACT.

Falls City now pleads that because its price discrimination did not involve "large buyer preference" and because Falls City itself was losing market share, somehow Falls City should be excused from its violation of the Act. To the extent Falls City is arguing that injury should not be presumed from price discrimination when the favored purchaser is not a "large buyer," its argument is irrelevant in view of the fact, as discussed in the previous Section of this brief, that here the competitive injury was clearly proved, not presumed.[99] To the extent Falls City is arguing that a plaintiff must prove both injury *and* large buyer preference, its argument is totally without support.[100] If "large buyer preference" were required, the Act would provide no deterrence from price discrimination in an industry such as beer distributing, where there are no "large buyers." Furthermore, this Court rejected the argument that the Act should be limited to situations involving large buyer preference in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 522 (1963).

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a whopping 100% decline in the distributor's volume of Falls City beer, which is impressive statistically but entirely irrelevant to Vanco's case.

[99] In any event it is illogical to assume that a disfavored purchaser will be damaged only if the favored competitor is a "large buyer." The likelihood of injury is especially clear where, as here, the price discrimination was very substantial, very sustained, and where the product involved—unlike the product in the *Morton Salt* case—was the mainstay of the plaintiff's business.

[100] Some commentators have suggested that injury should not be presumed *unless* there is large buyer preference. ABA Section of Antitrust Law, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Vol. 1, at 103 (1980). However, Falls City has cited no support for the theory that a plaintiff must prove *both* injury and large buyer preference.

In addition to the lack of support in policy or precedent for Falls City's "large buyer" theory, the argument reveals a cavalier attitude toward the language of the Act. There is, of course, no provision in the Act regarding the size of the favored purchaser.[101] Falls City's attempt to superimpose this requirement on the Act is reminiscent of a 1977 proposal by the Antitrust Division of the Department of Justice to amend the Act to prohibit discriminatory pricing only where the favored purchaser is a large buyer or the discrimination threatens to eliminate the disfavored purchaser from a line of commerce, where the effect would be substantially to lessen competition (United States Department of Justice, Report on the Robinson-Patman Act, Appendix C (1977)). This proposal was not adopted. The very fact that these changes were proposed as amendments to the Act indicates the awareness of the Antitrust Division at that time that Congressional action was necessary to impose on the Act the policy now advocated, pragmatically, by Falls City. It is wholly inappropriate for Falls City to urge this Court to amend the Act judicially to suit its purposes.[102]

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[101] As this Court stated in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 522 (1963), "[t]he Act is of general applicability and prohibits discriminations generally, subject only to defenses not based upon size."

[102] The present Antitrust Division has been widely reported in the popular press as less than zealous in its enforcement efforts (Sylvia Porter, *U.S. antitrust laws eroding under attacks,* Chicago Sun-Times, June 23, 1982 at 66), and its present head has publicly expressed hostility to the Act (see note 5, *supra*). Moreover, to the extent the Amicus is attempting to induce this Court to impose on the antitrust laws policies favored by it but not enacted by Congress, its argument is another example of the disrespect for this Court publicly expressed by the present head of the Antitrust Division. (See *A Talk With Antitrust Chief William Baxter,* Wall St. J., Mar. 4, 1982, at 22, where Mr. Baxter is quoted as calling this Court's antitrust rulings "rubbish," "wacko," "ludicrous" and "entirely unrooted in . . . economics.") However, in this case it is the position of the Antitrust Division that is entirely unrooted in the very economic theories it advocates in other contexts.

Even if this Court were to allow legislative proposals that were never enacted to color its interpretation of the Act, Falls City would not escape liability under the 1977 proposal by the Antitrust Division. Falls City has conveniently ignored the fact that that proposal would require a finding of a violation when a significant price discrimination clearly threatens to eliminate from competition a competitor of the favored customer where the effect may be substantially to lessen competition in any line of commerce in any section of the country. Falls City's price discrimination was a substantial factor in Vanco's financial difficulties.[103] The increasing trend toward concentration in the beer distributorship business and the pernicious vertical anticompetitive effects of the reduction in the number and quality of beer distributors was discussed at length in a case affirmed *per curiam* by this Court. *United States* v. *Jos. Schlitz Brewing Company*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966), *reh'g. denied*, 385 U.S. 1021 (1967). The anticompetitive effect of concentration in the beer distributorship industry is yet further evidence of the congruence, in this particular case, of the policies underlying the Act and those informing the rest of the antitrust laws.

Falls City also argues that its own business difficulties should somehow excuse it from liability. Just as the Act does not require large buyer preference, it also provides no exception for sellers who are themselves beset by business difficulties. Consistent with the free market emphasis of the antitrust laws, marginal sellers are not allowed to extend their commercial lives by imposing unfair burdens on one or more purchasers through discriminatory pricing, thereby interfering with the operation of competitive forces in the

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[103] If Falls City had charged Vanco the prices it charged Vanco's Kentucky competitor, Vanco would doubtless have decreased prices to its retailers, thereby boosting volume and profits. Even disregarding that fact, elimination of the price discrimination alone would have turned Vanco's total operating *loss* of $298,711 for the relevant period into a net *income* for the period of $276,582 (PX 86; PX 88).

markets in which such purchasers compete. A similar argument was made in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), where the plaintiff asserted that the competitive injury to the favored purchaser if the price concessions were eliminated would more than offset the injury to the disfavored competitors from the discrimination. This Court rejected that argument in language especially applicable to the present case:

> [W]e are not free on the basis of our own economic predilections to make the choice between harm to the [favored purchaser], on the one hand, and to the [disfavored purchaser], on the other, or to balance the comparative degree of individual injury in each instance; that choice is foreclosed by the determination in the statute itself in favor of "equality of treatment."

371 U.S. at 519. Similarly, this Court should not attempt to balance any asserted potential harm to Falls City from complying with the Act against the harm to Vanco from its violation.[104]

Falls City's attempt to cause this Court to reinterpert the Act to require large buyer preference or to excuse discrimination by unsuccessful sellers is wholly unnecessary to the proper determination of this case. It is also an inappropriate invitation to this Court to legislate changes that could have a dramatic economic and social impact, the consequences of which are difficult to forsee and the responsibility for which is properly consigned to Congress.

Falls City's arguments that "competitive injury" was not established are baseless, and the judgment of the Court of Appeals on the second question on which the writ of certiorari was granted should be affirmed.

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[104] Any sympathy value in Falls City's plaint that it was a "dying regional brewer" is lost with the recognition that its business difficulties reflected, in large part, its refusal to compete on the basis of price.

CONCLUSION

Falls City lost this case on its facts, which clearly showed that Vanco was damaged by Falls City's sustained, substantial and unjustified price discrimination and that the price discrimination was motivated by Falls City's participation in cooperative anticompetitive oligopoly pricing, in complete disregard for the requirements of the Act.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 28, 1982

SUPPLEMENTAL APPENDIX

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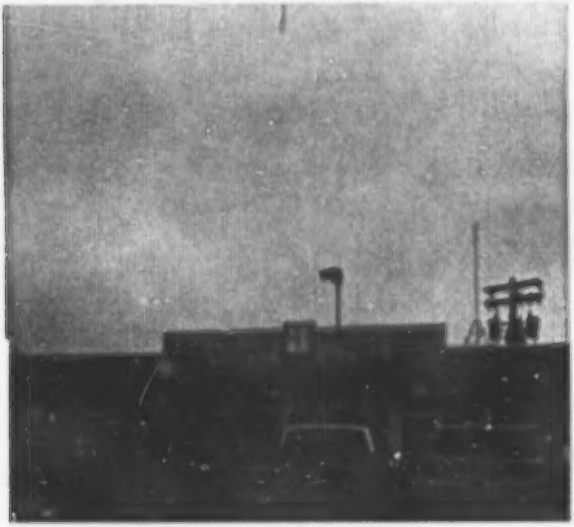
PLAINTIFF'S TRIAL EXHIBIT 112

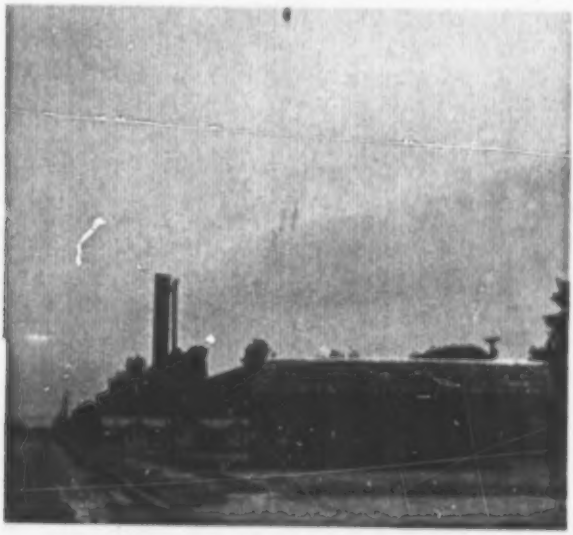
PLAINTIFF'S TRIAL EXHIBIT 113

PLAINTIFF'S TRIAL EXHIBIT 115



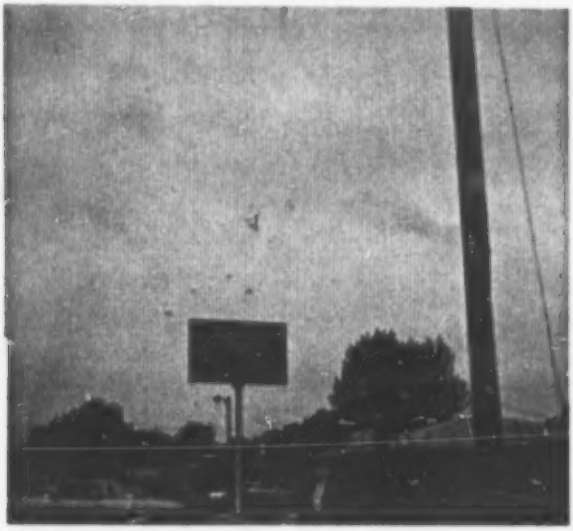
PLAINTIFF'S TRIAL EXHIBIT 116

PLAINTIFF'S TRIAL EXHIBIT 118



PLAINTIFF'S TRIAL EXHIBIT 123

PLAINTIFF'S TRIAL EXHIBIT 124



PLAINTIFF'S TRIAL EXHIBIT 126

PLAINTIFF'S TRIAL EXHIBIT 127

PLAINTIFF'S TRIAL EXHIBIT 128

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PLAINTIFF'S TRIAL EXHIBIT 131

Supplemental Brief

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT VANCO BEVERAGE, INC.

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Supreme Court Rule 35.5 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT VANCO BEVERAGE, INC.

I. Purpose of the Supplemental Brief

Petitioner, Falls City Industries, Inc. ("Falls City") and the United States as amicus curiae (the "Amicus") filed briefs on the merits of this case on May 17, 1982. Respondent Vanco Beverage, Inc. ("Vanco") filed its brief on July 28, 1982. After Vanco's brief was filed, intervening matters first came to the attention of counsel for Vanco. Therefore, this supplemental brief is filed under Rule 35.5 of the Rules of this Court to bring to the Court's attention "late authorities" and "intervening matters that were not available in time to have been included in . . . [Vanco's] brief in chief." These authorities and intervening matters are:

1. The August 25, 1982 Findings of Fact and Conclusions of Law of Chief Judge Allen Sharp of the United States District Court for the Northern District of Indiana on the plaintiff's Motion for a Preliminary Injunction in *Lafayette Beverage Distributors, Inc.* v. *Anheuser-Busch, Inc.*, No. L 82-52. A copy of this ruling was obtained by counsel for Vanco on September 21, 1982.

2. The brief by the United States as amicus curiae in *Weyerhauser Company and Willamette Industries, Inc.* v. *Lyman Lamb Company* and *Georgia Pacific Corporation* v. *Lyman Lamb Company*, Nos. 81-1618 and 81-1619 ("Lyman Lamb"), which was filed in this Court on August 13, 1982 and which was

obtained by counsel for Vanco on August 27, 1982.

3. Statements made by Federal Trade Commission ("FTC") Chairman James C. Miller, III, which were reported in 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1079, p. 379 (Aug. 26, 1982), which first came to the attention of counsel for Vanco on September 15, 1982.[1]

4. Statements made on September 9, 1982 by, among others, William F. Baxter, Assistant Attorney General, Antitrust Division,[2] before the House of Representatives Committee on Small Business, Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business. These statements first came to the attention of counsel for Vanco on September 10, 1982 and counsel for Vanco obtained a transcript of these statements on September 22, 1982.

5. Statements made on September 9, 1982 by, among others, William F. Baxter in a joint hearing before the Senate Small Business Committee and the State, Justice, Commerce and the Judiciary Subcommittee of the Senate Appropriations Committee. These statements first came to the attention of counsel for Vanco on September 10, 1982 and counsel for Vanco obtained a transcript of these statements on September 22, 1982.

II. *Lafayette Beverage Distributors, Inc.* v. *Anheuser-Busch, Inc.*

On August 25, 1982, Chief Judge Allen Sharp of the United States District Court for the Northern District of Indiana, in denying the plaintiff's motion for a preliminary injunction seeking to halt termination by defendant as a beer distributor, issued Findings of Fact and Conclusions of Law in *Lafayette Beverage Distributors, Inc.* v. *Anheuser-Busch, Inc.*, No. L 82-52 (N.D. Ind., Aug. 25, 1982). Among Chief Judge Sharp's Conclusions of Law, at pages 16-17, is the following:

> 7. Indiana is a uniform F.O.B. state and accordingly Anheuser-Busch sells its products to all of its Indiana wholesalers at the same price. Despite Anheuser-Busch's uniform pricing, wholesale prices to retailers

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[1] The Amicus brief in this case was joined in by the Federal Trade Commission.

[2] Mr. Baxter's name follows immediately after that of Solicitor General Lee in the brief filed by the Amicus in this case.

vary dramatically throughout the state [of Indiana] . . . [3]

Vanco respectfully directs the attention of the Court to the above statement for the purpose of showing that the relevant competitive geographic market for beer wholesalers is, as in the case of Vanco Beverage, Inc., not the entire state of Indiana but those geographic markets where wholesalers, and wholesalers' retailers, actually compete for the sale of beer. Thus, as is obvious from the record in the *Vanco* case and from Chief Judge Sharp's finding in *Lafayette,* Falls City is wrong when it states in its Petition for a Writ of Certiorari that in the brewing industry there are "competitively separate state wholesale markets" (Pet. at 9).

III. The Government's Amicus Brief in the *Lyman Lamb* Case

The Government as Amicus in the *Lyman Lamb* case has taken a position which is correct, but is inconsistent with the position it has taken as Amicus in this case. Vanco requests this Court to take judicial notice of the brief of the Amicus in the *Lyman Lamb* case, pursuant to *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969) and *United States* v. *Pink,* 315 U.S. 203, 216 (1942).

As the Amicus correctly recognized in its brief in the *Lyman Lamb* case, a petitioner challenging in this Court a factual finding made by the trier of fact and affirmed on appeal bears an exceptionally heavy burden. The Amicus correctly states in its *Lyman Lamb* brief:

> In attempting now to relitigate their evidentiary claims, petitioners assume a weighty burden. In the present posture of this case, the reviewing court is required to "view the evidence in the light most favorable to [respondents] and to give [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 (1962) (footnote omitted). An appellate tribunal cannot reweigh the evidence because "[i]ssues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the

[3] Under Indiana law, wholesalers are also required to charge all customers the same price (Ind. Code Ann. § 7.1-5-5-7 (Burns 1976). This law was passed by the Indiana legislature in 1941 and applies to all permittees who sell alcoholic beverages.

jury." *Grunning* v. *Cooley,* 281 U.S., 90, 94 (1930).

The Amicus then went on to emphasize:

> These general principles of appellate review apply with particular strictness when a case reaches this Court, which does not sit to determine the facts underlying legal controversies. See *Branti* v. *Finkel,* 445 U.S. 506, 519 n.6 (1980): "In view of our settled practice of factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous." There is no basis for departing from that rule here. * * * (*Lyman Lamb* br. at 16, all brackets in *Lyman Lamb* br.)

In this case, the petitioner and the Amicus, in asking this Court to hold that Falls City established the meeting competition defense, are really asking this Court to reverse the factual findings of the district court, which were affirmed by the Seventh Circuit. The Amicus in its brief has acknowledged that, as Representative Utterback, House of Representatives manager of the Robinson-Patman Act, emphasized at the time the law was enacted, the meeting competition defense—

> *leaves it a question of fact* to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, *and whether the way in which the competition was met* lies within the latitude allowed by those limitations. (Amicus br. at 11, emphasis provided by Amicus.)

Yet the Amicus fails to recognize the extraordinary burden it must meet in seeking to overturn such findings in this court, introduces no matter or argument which could support such a reversal, and fails to give the respondent, Vanco, the benefit of all reasonable inferences. The Amicus also misconstrues the opinions of the courts below and the record in this case.

The holding of the district court, as is abundantly clear from its opinion, was that Falls City had failed to establish that its price discrimination resulted from a good faith attempt to meet competition (Pet. at 37a, 48a-49a, which for the convenience of the Court are set out as an appendix bound together with this brief). The district court supported its holding with a recitation of the following facts: (1) Falls City's price discrimination did not result from lowering its

prices to Vanco's competitor, but from raising them to Vanco, (2) these price increases were the result of Falls City's policy of following the higher prices of other brewers, (3) the purpose of Falls City's higher Indiana prices was to increase its profits, (4) Falls City had a policy of establishing a single price for each state in which it sold beer, but since its competitors did not have a single price in Kentucky it could not have been meeting any such price, (5) no Kentucky distributors pressured Falls City to keep its Kentucky price low, and (6) Falls City did not even consider adjusting its prices on a customer to customer basis (Pet. App. 19a).

However, the Amicus represented to this Court in its brief on the merits that the following was the district court's finding on the meeting competition issue:

> Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant's pricing policy was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers [because] the Kentucky competitors had all kinds of prices. (Amicus br. at 4.)

Thus, the Amicus implies that the district court's holding involved only the findings numbered 4 and 6 in the summary above. This is a transparent attempt by the Amicus to elevate a factual finding supporting the ultimate conclusion into an ostensible rule of law, and to ignore the four other factual findings of the district court which also support the ultimate conclusion.

Further, the Amicus has taken the liberty of speculating as to evidence which is either contrary to the record or totally absent from the record. The following are examples of such self-serving speculation:

1) The Amicus twice speculates that Falls City may have incurred higher costs in selling beer to Indiana distributors than to Kentucky distributors (Amicus br. at 28 n. 16, 29), despite the fact that Falls City's president admitted that Falls City's costs were identical for sales to Indiana and Kentucky.[4]

---

[4] See Vanco's brief in chief at 40 n. 54; see also Tr. 977, J.A. 96; Tate dep., PX 30 at 89, J.A. 109).

2) The Amicus speculates that the industrywide price differential between Indiana and Kentucky could be the result of an Indiana law prohibiting price discrimination among Indiana distributors (Amicus br. at 28 n. 16), despite the fact that the record shows that wholesale prices were lower in West Virginia, which had a nondiscrimination law similar to Indiana's (see Vanco's brief in chief at 16 n. 23, 41-42 n. 56). Further, the Amicus introduced evidence, and filed that evidence in this Court, in *United States* v. *Pabst Brewing Company,* 384 U.S. 546 (1966), that the prices charged in 1956-1959 by Pabst[5] and Blatz, two of the major brewers, *were the same or lower in Indiana than in Kentucky.*[6] Since the Indiana nondiscrimination law had been on the books since at least 1941 (Acts 1941, ch. 237), and many years later there was no price discrimination against Indiana wholesalers, that law clearly cannot be responsible for the discrimination that later developed.

3) The Amicus speculates that Falls City's prices in Kentucky may have lagged behind those in Indiana as a result of vigorous price competition in a period of rapid inflation (Amicus br. at 23), despite the fact that Falls City's president admitted that its competitors were the same in Indiana and Kentucky (see Vanco's brief in chief at 36 n. 46) and that there was no evidence as to the extent, if any, of inflation in the beer industry in the relevant period.

4) The Amicus also speculates that setting different prices might have imposed prohibitive administrative costs on Falls City (Pet. at 15), despite the fact that Falls City never even suggested such an explanation for its policy of charging a single price in each state and that Falls City admitted that the policy was merely the result of inertia (see Vanco's brief

---

[5] Pabst was identified by Falls City as one of its two major competitors (see Vanco's brief in chief at 16).

[6] Transcript of Record in *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966); No. 404, filed with the Court on July 28, 1965, at 253, 255, 261 and 264. This Court may take judicial notice of the evidence introduced by the Amicus, pursuant to *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969) and *United States* v. *Pink,* 315 U.S. 203, 216 (1942). Relevant excerpts from the record in the *Pabst* case appear in the Appendix to this brief at S.A. 3-8.

in chief at 23, 24 n. 31).

The inconsistency between the statements of the Amicus in *Lyman Lamb* and its position in this case reveal that the Amicus is really seeking to use this case as a vehicle to establish a rule of law that so enlarges the principal defense to a charge of price discrimination as to nullify the statute. The desire of the Amicus to effect such policy changes is evident from the public statements discussed below.

IV. The Amicus Is Attempting to Use this Case to Change Existing Antitrust Law

Vanco believes that the interest of the Amicus in this case stems from the conviction of the Amicus that the Robinson-Patman Act is "uneconomic." Consequently, the Amicus seeks, contrary to the Congressional mandate, to develop new policy to limit the effectiveness of the Act.

This view is supported by recent testimony by Assistant Attorney General Baxter and by a recent speech by James C. Miller III, Chairman of the FTC. Mr. Baxter recently appeared before Congressional committees to testify as to antitrust enforcement.[7] The members of those committees were clearly opposed to the attempts of the Antitrust Division and the FTC to enforce the antitrust laws selectively. They also objected to their efforts to argue in this and other courts for changes in the interpretation of the laws which accord with the economic theories of the present heads of the Justice Department and the FTC, but conflict with the law as enacted by Congress and interpreted by this Court. Excerpts from those hearings are included in the appendix bound together with this brief.[8] The expressions of concern of the

---

[7] Mr. Baxter testified before the House of Representatives Committee on Small Business; Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, on September 9, 1982, and before a joint hearing of the Senate Small Business Committee and the State, Justice, Commerce and the Judiciary Subcommittee of the Senate Appropriations Committee on the same day.

[8] Counsel for Vanco obtained copies of the unedited transcripts (without written statements of certain witnesses) of Mr. Baxter's testimony and other testimony before the House Subcommittee and the testimony of Mr. Baxter and his interrogation by certain

committee members and the uninhibited responses of Mr. Baxter clearly show that the executive branch of the Government is attempting, through selective enforcement and Amicus intervention, to wreak policy changes in present law which have not been mandated by Congress. For example, the transcript of the hearings by the House Subcommittee contains the following statement and colloquy with respect to the Robinson-Patman Act, the antitrust laws generally and vertical price restraints:

> REP. LUKEN (Ohio, Chairman of the Hearing): When the nation's top antitrust law enforcement official has described the Robinson-Patman Act as a "dreadful piece of legislation, full of absurdities", and has apparently acted upon the basis of that statement, then there is real cause for concern and investigation by the subcommittee.
>
> * * * *
>
> Mr. LUKEN. You have been widely quoted in the Washington Post, and this quote comes through a number of these witnesses as to your disagreement with the present law. You are quoted as saying that the disagreement is not about the present state of the law so much as whether that law really makes sense; is that not your quote?
>
> Mr. BAXTER. It probably is. I don't remember using exactly those phrases, but I have no difficulties with that.
>
> Mr. LUKEN. Isn't that the law that the Congress passed that you are talking about?
>
> Mr. BAXTER. No. That is the law that the Supreme Court has announced.
>
> Mr. LUKEN. It is the law the Supreme Court has announced.
>
> Mr. BAXTER. Right.
>
> Mr. LUKEN. You are saying that doesn't make sense.
>
> Mr. BAXTER. That is correct.
>
> Mr. LUKEN. That doesn't give you any problem that you are making these statements that it doesn't make sense and that your avowed purpose is to change that law rather than to carry it out?

Senators during the Senate joint hearing and has obtained permission to quote from these transcripts and to disclose them to the Court. Accordingly, ten copies of these transcripts (as furnished to Vanco's counsel) are lodged with the Clerk of the Court.

Mr. BAXTER. No, it doesn't give me any problem at all.

Mr. LUKEN. Did we hire you as an advocate to change the law?

Mr. BAXTER. The President appointed me explicitly for that purpose.

Mr. LUKEN. To change the law? Maybe we should be the President. Did he state that in your commission?

Mr. BAXTER. No, I didn't talk with the President. I should have said the Attorney General did.

Mr. LUKEN. When he gave your commission, was that in writing to change the law?

Mr. BAXTER. No. It was oral.

Mr. LUKEN. Was it public?

Mr. BAXTER. We understood it to be an important part of the job.

(*The Impact of Federal Antitrust Enforcement on Small Business: Hearing Before the Subcommittee on Antitrust and Restraint of Trade Affecting Small Business of the House Committee on Small Business (unofficial transcript)*, Sept. 9, 1982, 2, 170-77,)

Vanco believes, as did the subcommittee members, that such an unilateral attempt to change established law is improper.[9] Vanco also believes that the intervention of the Amicus in this case is a good example of the Amicus' admitted desire to effect far-reaching policy changes.

James C. Miller, III, Chairman of the Federal Trade Commission, stated in an August 23, 1982 speech to the Japan Federation of Economic Organizations (excerpts of which are included in the appendix to this brief), that the FTC would enforce the Act when, in its opinion, the Act is consistent with the other antitrust laws:

> [T]he economic objection to [price discrimination] is that it reflects the existence of monopoly power and consequent misallocation of resources. . . .
>
> [*W*]*hen persistent price discrimination reflects the abuse of a dominant or powerful market position either by seller or buyer, we will attack it vigorously.* Price discrimination which is merely episodic, however, may well represent a first step in the breakdown of rigid or collusive pricing

[9] Please also see the statements made by Senator Slade Gorton (of Washington), at 59-62 of the Senate Subcommittee transcript, and at the Appendix at S.A.23-S.A.25.

> or a device for entering a new market at efficient scale, and deserve applause rather than prohibition. (43 ANTITRUST & TRADE REG. REP. (BNA) No. 1079, at 379 (Aug. 26, 1982) (emphasis added))

However, that public statement by Mr. Miller is inconsistent with the FTC's involvement in this case. There is no exception in the Act to excuse price discrimination because it was committed by a regional brewer, especially when, as here, it causes antitrust injury to an ever smaller business (Vanco). Further, as is demonstrated in Vanco's brief in chief (at 14-26, 37-41), the Robinson-Patman Act violation involved in this case is precisely the sort of persistent and substantial price discrimination which reflects the abuse of a market position that Chairman Miller has pledged vigorously to prosecute.

CONCLUSION

The arguments of the Amicus in this case are inconsistent with the Robinson-Patman Act as enacted and as heretofore consistently interpreted. In advocating what is, in effect, a sweeping policy change, the Amicus has taken positions in this case totally at odds with its correct statement of the law in *Lyman Lamb,* has done violence to the opinions and record in this case and has overstepped its Congressional mandate.

The respondent respectfully urges this Court to reject the arguments of the Amicus and of the petitioner, Falls City.

Respectfully submitted,

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October 6, 1982

APPENDIX
TO
SUPPLEMENTAL BRIEF

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Excerpts from the Holdings of the District Court, Reflecting All of the Reasons for the Failure of Falls City to Establish the Meeting Competition Defense

The defendant's contention that the lower prices to its Kentucky distributors so competing with plaintiff were made in good faith to meet an equally lower price of a competitor of defendant is unsupported by the evidence. Defendant's prices were not established in good faith to meet an equally lower price of a brewery competitor. The lower price accorded defendant's Kentucky distributors of beer in the relevant geographic market area was not the result of a threat from such Kentucky distributors that they would buy their beer from other brewers or from other brewers selling beer at a lower wholesale price unless defendant adjusted its wholesale price of beer. Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant's pricing policy was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers as the Kentucky competitors had all kinds of prices. The defendant raised its prices to wholesale distributors in the State of Indiana, including the plaintiff. It was done by defendant to obtain more profit for defendant. The defendant set its Indiana price higher than its Kentucky price for the sole reason that it followed the other brewers, or leaders of other beers for its profit. It was not meeting competition, its action was to get a higher price in Indiana than in Kentucky. Defendant's lower price to Kentucky competitors of plaintiff was not due to any differences in cost of manufacture, sale, or delivery to Indiana and Kentucky distributors. Defendant's lower price to Kentucky competitors of plaintiff was not established, nor was it a change in price in response to changed conditions affecting the market for or the marketability of defendant's beer.

* * * *

The defendant has failed to prove by a preponderance of the evidence the facts of the essential legal elements of the second affirmative defense of the amended answer to count two of the complaint as amended.

The discriminatory prices of defendant were not made in good faith to meet an equally lower price of a brewery competitor as found. The defendant raised its prices to wholesale distributors in the State of Indiana, which included the plaintiff. It was done to obtain more profit for defendant. This is not a lowering of the price to meet a brewer competitor's price within the teaching of Title 15 U.S.C. Section 13(b) and at the same time leaving the price lower than Indiana's price to Kentucky distributors of defendant's beer in Henderson County, State of Kentucky. The defendant's pricing policy, as found, was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers as the Kentucky competitors had all kinds of prices. The lower price accorded defendant's Kentucky distributors of beer in the relevant geographic market area was not the result of a threat from such Kentucky wholesalers and distributors that they would buy their beer from other brewers or from other brewers selling beer at a lower wholesale price unless defendant adjusted its wholesale price of beer. Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant set its Indiana price higher than its Kentucky price for the sole reason that it followed the other brewers, or leaders of other beers, for its profit. It was not meeting competition, its action was to get a higher price in Indiana than in Kentucky. (Pet. 37a, 48a-40a.)

S.A.3

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 404

UNITED STATES, APPELLANT,

vs.

PABST BREWING COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

FILED JULY 28, 1965

PROBABLE JURISDICTION NOVEMBER 8, 1965

SUPREME COURT OF THE UNITED STATES

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[fol. 286] IN THE UNITED STATES DISTRICT COURT

GOVERNMENT EXHIBIT No. GX-115

Answer to Interrogatory 10 as amended and modified by Agreed Order entered March 21, 1960.

U.S. v. Pabst Brewing Co., 59 C 215 (E.D. Wis.)

Interrogatories served on Pabst Brewing Co., November 13, 1959.

> "10. State the prices charged by Pabst since January 1, 1956 for "Pabst Blue Ribbon" brand of beer to distributors on the following units of sale: Returnable bottles, package of 24-12 oz. bottles."

The prices charged to distributors during the period January 1, 1956 to December 31, 1959 for "Pabst Blue Ribbon" brand of beer on packages of 24-12 oz. returnable bottles are as follows. "Price" is defined as F.O.B. brewery price (unless otherwise indicated) on cases of 24-12 oz. loose bottles before any discounts or allowances and does not include bottles deposits or state taxes.

Date Price Effective	Price
Alabama	
1/ 1/56	2.46
Arizona	
1/ 1/56	2.525
Arkansas	
1/ 1/56	2.46
4/ 1/57	2.36

Date Price Effective		Price
[fol. 288]	Florida	
1/ 1/56		2.46
	Georgia	
1/ 1/56		2.46
	Idaho	
1/ 1/56 [1]		2.46
1/ 1/56 [2]		2.525
2/11/57 [1]		2.58
2/11/57 [2]		2.645

[1] Shipped from Milwaukee.
[2] Shipped from Los Angeles.

	Illinois	
1/ 1/56		2.46
	Indiana	
1/ 1/56		2.43
	Iowa	
1/ 1/56		2.32
	Kansas	
1/ 1/56		2.43
	Kentucky	
1/ 1/56		2.43
	Louisiana	
1/ 1/56		2.46
[fol. 289]	Maine	
1/ 1/56 [1]		2.60
1/ 1/56 [2]		2.46 [2]

[1] Shipped from Newark.
[2] Shipped from Milwaukee.

[fol. 296] IN THE UNITED STATES DISTRICT COURT

GOVERNMENT EXHIBIT No. GX-124

Answer to Interrogatory 26 as amended and modified by Agreed Order entered March 21, 1960.

U.S. v. Pabst Brewing Co., 59 C 215 (E.D. Wis.)

Interrogatories served on Pabst Brewing Co., November 13, 1959.

> "26. State the prices charged by Blatz since January 1, 1956 for "Blatz Pilsner" brand of beer to distributors on the following unit of sale: Returnable bottles, package of 24-12 oz. bottles."

The prices charged by Blatz to distributors during the period January 1, 1956 to December 31, 1959 for "Blatz Pilsner" brand of beer on packages of 24-12 oz. returnable bottles are as follows. "Price" is defined as F.O.B. brewery price (unless otherwise indicated) before any discounts or allowances and does not include bottle deposits or state taxes.

Date Price Effective	Price
Alabama	
1/ 1/56	2.06
7/12/56	1.86
Arizona	
1/ 1/56	2.25
7/15/59	1.90
Arkansas	
1/ 1/56	2.11
9/10/58	1.75
3/19/59	1.80

Date Price Effective	Price
Indiana	
1/ 1/56	2.21
5/28/56	1.75
Iowa	
1/ 1/56	2.16
6/12/56 [1]	1.87
6/12/56 [2]	1.75
4/15/59	1.80 to 1.90 [3]

[1] Eastern Iowa only.
[2] Western Iowa only.
[3] Prices within this range vary by local areas.

Kansas	
1/ 1/56 [1]	2.46
10/15/56	1.88
10/10/58	1.82
3/19/59	1.86

[1] All of state but Wichita; Wichita price 1.96.

[fol. 300]

Kentucky	
1/ 1/56	2.46
4/28/58 [1]	1.80
10/20/58 [2]	1.70
10/22/58 [3]	1.75
2/26/59 [4]	1.75
3/19/59 [5]	1.70
4/24/59 [6]	1.75

[1] Henderson only.
[2] Louisville only.
[3] Vanceburg only.
[4] Richmond only.
[5] Maysville only.
[6] Wallins Creek and Hazard only.

Louisiana	
1/ 1/56	2.06
1/10/57 [1]	1.86
12/17/58	1.70

[1] New Orleans only.

Excerpts from *The Impact of Federal Antitrust Enforcement on Small Business: Hearing Before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Committee on Small Business* (unofficial transcript), Sept. 9, 1982

REPRESENTATIVE THOMAS A. LUKEN (Ohio, Chairman of the hearing): While the area of antitrust law has always triggered vocal debate, recent statements by opponents of the laws and their enforcement has caused widespread concern throughout Congress and throughout the business community, especially the small business community.

When the nation's top antitrust law enforcement official has described the Robinson-Patman Act as a "dreadful piece of legislation, full of absurdities", and has apparently acted upon the basis of that statement, then there is real cause for concern and investigation by the subcommittee.

The Chairman of the FTC has described circumstances where he believes price discrimination "deserves applause rather than prohibition".

Further, Federal officials have turned their backs on the laws governing resale price maintenance. Mr. Baxter has stated that, "the disagreement is not about the present state of the law so much as whether the law really makes sense. The Supreme Court has said on a variety of occasions that vertical price fixing is, per se, illegal. Yet it is the position of the Antitrust Division that [this practice] should not be illegal per se in view of certain competitive principles".

The purpose of the law is as valid today as when our predecessors were enacting the Sherman, Clayton and Robinson-Patman Acts. It is well known that small business makes important vital contributions to our society and to the economy. They are the leaders in innovation and job creation.

Because of this special role, any change in policy which

has a potential impact upon this vital segment of our economy should be carefully scrutinized. (p. 2-3.)

* * * *

REPRESENTATIVE BEDELL (Iowa): I think the Chairman has put his finger upon the real issue that we face here today, which I believe is about as important an issue as we could discuss. That issue is whether or not the Government is going to operate in the manner in which our forefathers originally intended to operate, which was that the Congress would enact the laws, signed or vetoed by the President, to be administered by the Executive Branch of the Government.

It appears quite clear that we face at this time a case where Congress has enacted laws, they have been signed by the President, where the Justice Department and others in the administration think that those laws are improper and wrong. The proper way to correct laws that are wrong is for them to go to the President or come to the Congress and have them changed. It certainly is not proper for them, simply because they disagree with what Congress may have done, to decide that they are going to not enforce the laws that have been passed by the Congress.

I believe that is the issue we face today. I think it is important that it should be brought up. I think it is much more important as a basic issue than simply whether or not this particular case is going to be prosecuted or ignored. I think the real issue here is whether or not we are going to expect Government to operate as it is supposed to operate, or whether we are going to give people within the administration the opportunity to simply flaunt the will of the Congress, flaunt the laws that are made, and say that "because we think the laws are wrong, we are going to ignore them or will not enforce them as we are charged to do." (p. 4-5.)

* * * *

JARED O. BLUM, (Vice Chairman, Small Business

Legislative Council): Mr. Baxter has referred to the Robinson-Patman Act, as you stated in your opening statement, Mr. Chairman, as full of "absurdities", and as an "unjustified protection for small business from the rigors of competition." Indeed, according to a very recent article in the Washington Post, Mr. Baxter would even permit illegal resale price fixing because, in his view, the present law on the subject does not make sense.

The timing of this hearing is quite fortuitous, and this issue is bipartisan in nature. I call to your attention the hearing on the Senate side today, being chaired by Senator Rudman, a former Attorney General in the State of New Hampshire, and Senator Slade Gorton, another former Attorney General, has also indicated great interest. These former Attorneys General are very concerned about the failure to enforce the law.

* * * *

Consider next the Robinson-Patman Act. There is no antitrust law more strongly supported by the small business community than this anti-discrimination law. The Department of Justice simply ignores this basic statute, which is contained in Section 2 of the Clayton Act. The FTC's Bureau of Competition, on the other hand, from time to time has been quite diligent in its enforcement.

It is clear that the Justice Department's antitrust lawyers know that price and other forms of discrimination are a favorite and frequently employed tool of the monopolist or the would-be monopolist. Why do they not enforce the law?

In accordance with an informal intragency agreement, the Federal Trade Commission, therefore, has assumed the responsibility of bringing Government claims under R-P. I am attaching to this testimony, and I ask that it be made a part of the record, data compiled by Anthony Robinson, Senior Economist, Office of Economic Research at the U.S. Small Business Administration, on the number of antitrust cases commenced by the Government, focusing on enforcement of

the R-P Act through June, 1981. It is plain that since 1975 the number of R-P cases brought is insignificant.

I might say at this point that though we at the SBLC may disagree with Chairman Miller at the FTC on some issues, including R-P, we applaud his continued statements of his intent to enforce the law, and also his ongoing and quite successful outreach program to the small business community to determine what our needs and concerns are. We do take issue with a recent statement by the Chairman that he made to the Japan Federation of Economic Organizations, that he would prosecute only persistent price discrimination conduct cases. Under this theory, the bodies will have to be in plain sight and strewn throughout the landscape before the Commission would bring an R-P case. The law is quite clear, that episodic price discrimination is also illegal.

Let us turn finally to the area of vertical restraints. On October 30th, 1981, Ronald Carr, Deputy Assistant Attorney General of the Antitrust Division, told the Ohio State Bar Association that vertical restraints, in the Division's scheme of things, should be placed somewhere down the enforcement line, "possibly to the point of vanishing." Further, Mr. Carr viewed resale price maintenance, which is, indeed, per se illegal, as having some beneficial effect. Indeed, this committee has already commented on Mr. Baxter's comments in the Washington Post. We can debate the merits or disadvantages of allowing manufacturers to fix prices with their retailers. Indeed, it may well be folly to accept the economic idea of efficiency as paramount, a value to which all others are subordinate. But one thing beyong debate is that today resale price maintenance is per se illegal.

We began this testimony by commenting that there appears to be a determined effort to reverse some 90 years of tradition of antitrust enforcement. We can think of no better example of this effort and of no legitimate excuse for the Government's refusal to enforce the law as it now exists.

An analogous situation may be of a district attorney in a

county who disagrees philosophically with drug enforcement and decides not to prosecute cocaine and heroin dealers.

* * * *

[W]e have indications from the field that, indeed, in the last several years, perhaps in the last two to three years, that in the area of pricing practices there has been an increase in the attempts to impose a resale price maintenance, and also in the area of R-P discriminatory pricing. (p. 11, 13-15, 18-19.)

* * * *

Mr. SEIFERT. There literally has been a strike by the Government in terms of bringing Robinson-Patman cases. In the Sixties it was commonplace for the Government to initiate 100 to 200 cases annually. That figure from '72 on has been about one. We have been advised officially that the Government is bringing no R-P cases. Those are private sector cases which have been increasingly large. (House Hearings 19.)

* * * *

REPRESENTATIVE DORGAN (N.D.): The issue of antitrust enforcement, the issue of resale price agreements, those kinds of things, it is a very complex issue. I think sometimes it is necessary to take a look at these issues through glasses that are not colored by legalistics, but colored by common sense in what is good for the country and what was meant by the statutes, in not a technical term but a substantive term. I worry that sometimes that is happening.

In your testimony, Mr. Baxter, you stated that when we receive a complaint about a resale price maintenance, we conduct an inquiry to determine whether the particular practice is truly anticompetitive, that is, whether it facilitates horizontal collusion. Whether it is anticompetitive or not, it is against the law; is it not?

Mr. WILLIAM F. BAXTER, Assistant Attorney General in charge of the Antitrust Division: Yes, the

Supreme Court has repeatedly said that these practices are illegal per se. They never explained why they thought they should be, but it had repeatedly said that they were.

Mr. DORGAN. Therefore, if someone registers proper complaint and they are telling you that a retail price maintenance agreement exists that is against the law, I guess I don't understand why you are concerned about inquiring to determine whether it is truly anticompetitive, the emphasis on the word "truly." If your inquiry determines that, in your judgment, it is not, then you would fail to do anything about that complaint?

Mr. BAXTER. Very likely, yes. I hate to think of the size that the Antitrust Division would have to be in order to bring every conceivable case that came across the horizon.

Mr. DORGAN. Perhaps the best test of government would be to have a very large Antitrust Division in this country, as opposed to some other departments that we have, with a large contingent of lawyers or analysts working in it so the marketplace is truly a free marketplace. I am not so concerned about devoting resources to antitrust activity.

One of the reasons I came over—I am on the full committee not on this subcommittee—I came over because [I have] been concerned over the months of the statements I have read in the newspapers and publications that you have made. I grew up reading about the things that the late Phillip Hart was doing on antitrust issues. I think he did some incredibly good things in his term in the U.S. Senate. He did them by himself, virtually. He plodded and plodded and plodded along on these issues and kept at them tenaciously because he cared about competition, he cared about what concentration was doing to choking off competition in the economy, and he had the kind of long-term perspective, I think, of what the future of this country would be unless we cared about really enforcing our antitrust laws.

I see very little of the work that Phil Hart did being continued here in Congress, and then I read the sort of

statements that I hear coming from you and I am very concerned. I am not presuming that all the statements are accurate. Let me, if I might, read a couple back to you. The first one is dealing with conglomerates or verticals. You were quoted as saying, "There is nothing written in the sky that says that the world will not be a perfectly satisfactory place if there were only 100 companies, provided each one had only 1 percent of every product and service market."

Is that really how you feel? Is that an accurate quote, first of all? If it is, do you really believe that?

Mr. BAXTER. Yes, it is an accurate quote. Yes, I think that from every economic perspective, that would result in an intensively competitive and very satisfactory set of commercial arrangements.

Mr. DORGAN. Do you think if the goods and services that were produced and distributed in this country were done so by 100 corporations, each having 1 percent of the market, we would have a perfectly competitive system, one in which you, as the head of the Antitrust Division in Justice Department, would not have any difficulties with?

Mr. BAXTER. I wouldn't call it a perfectly competitive system, because if you taught economics somewhere or at some point or other, presumably you know that that phrase is usually reserved for situations that embody a number of theoretical characteristics like perfect information, and so on, and so forth. But I would certainly regard it as yielding an effectively competitive economy.

Mr. DORGAN. I have got to tell you, and I don't mean this personally, but I am so frightened by having [someone] with that philosophy as the head of our antitrust activities in the U.S. Justice Department, I can't even describe it to you. That philosophy is so foreign to the kinds of things I believe about this country's economy, about the need for competition in this country, that I can't even begin to describe the chasm that exists.

* * * *

Mr. DORGAN. Mr. Baxter, I appreciate your patience in my questioning. I have to tell you that it is my judgment, and mine only, that you view is the narrowest possible view in trying to determine what is good for this country's free and competitive economy in the future. We disagree, and I hope that we can do that respectfully. I submit to you that that is the way I feel. I want to impress upon you that my disagreement is profound on this matter with you.

I think that we need someone in the Antitrust Division who has a perspective about aggressively pursuing the kinds of conclusions that give us a strong and free and continually competitive economy, and I don't see that coming from your kind of philosophy. (p. 143-47, 153.)

* * * *

REPRESENTATIVE LUKEN: You are in disagreement with the per se rule, are you not?

Mr. BAXTER. I most certainly am.

Mr. LUKEN. That is a rule of the Supreme Court, that the Supreme Court has laid down interpreting the acts of Congress?

Mr. BAXTER. Yes.

* * * *

Mr. LUKEN. We have had the criticism here today that, in effect, you have announced you will not enforce the legal prohibition against resale price maintenance except when, according to your economic views, it will be desirable to do so. What would be your comment on that?

Mr. BAXTER. My comment on that is that there are a variety of industrial circumstances under which resale price maintenance can do damage to consumers, and a number of circumstances in which it cannot not.

Mr. LUKEN. Do you decide when it shall damage consumers?

Mr. BAXTER. Yes.

Mr. LUKEN. By what guidelines?

Mr. BAXTER. By economic analysis.

Mr. LUKEN. Not by any guidelines set forth in the legislation?

Mr. BAXTER. No. There are no guidelines set forth in the legislation.

Mr. LUKEN. Certainly not by any guidelines set forth by the Supreme Court.

Mr. BAXTER. No. That is correct.

Mr. LUKEN. You don't follow the Supreme Court?

Mr. BAXTER. There are no such guidelines set forth by the Supreme Court.

Mr. LUKEN. You disagree with the Supreme Court. You are lobbying in the courts. You are filing amicus in private cases.

Mr. BAXTER. That is correct.

Mr. LUKEN. To change the rulings of the Supreme Court.

Mr. BAXTER. And the lower courts as well.

Mr. LUKEN. It is the Supreme Court we are talking about.

Mr. BAXTER. In the Supreme Court as well.

Mr. LUKEN. Not in the Supreme Court, rulings of the Supreme Court.

Mr. BAXTER. We are filing amicus briefs in the Supreme Court urging the Supreme Court to change prior rulings, as they have done, of course, many times in the past.

Mr. LUKEN. This gives many people problems because you then become an advocate for overturning the law instead of an enforcer, instead of an official who carries out the execution of those laws.

Mr. BAXTER. I see nothing incompatible about those. That is a time-honored tradition.

Mr. LUKEN. It may be as a small part of your job. But it appears that this is the major thrust of your version of your job, of your vision of what you should be doing.

Mr. BAXTER. I regard it as an important part.

Mr. LUKEN. Are you enforcing the per se rule?

Mr. BAXTER. We are enforcing resale price maintenance whenever it seems to us [at] all likely there is damage to consumers.

Mr. LUKEN. People are getting the idea that, since you are filing these amicus briefs against this per se rule that the Supreme Court has laid down—

Mr. BAXTER. We haven't, incidentally, filed any briefs on that particular point.

Mr. LUKEN. If you haven't filed a brief, that is about the only thing you haven't done about it, right? You have shouted from the housetops that you disagree with it. Aren't you trying to overturn that?

Mr. BAXTER. I have tried to make it unambiguously clear, that is correct.

Mr. LUKEN. How are you trying to overturn it if you didn't file any briefs? You have done it in other cases.

Mr. BAXTER. We have filed amicus briefs on other issues. We have not had an occasion to file an amicus brief on this issue, but we are looking for an opportunity to do so.

Mr. LUKEN. We have a criticism from Professor Flynn who says that the proposal Mr. Baxter to selectively intervene in private suits is an unwise, as well unauthorized step because the enforcement agencies will find themselves besieged by lobbyists pleading for government intervention on one side or the other in many, if not every private case. Do you foresee a danger of that kind?

Mr. BAXTER. I foresee that is a realistic concern. We have indeed had people lobbying us, if you would like to put it that way.

Mr. LUKEN. Do you think Congress made a mistake in repealing the fair trade laws?

Mr. BAXTER. Not at all. I supported repeal of the fair trade laws for years.

Mr. LUKEN. But this effort of yours certain[ly] runs directly counter to the intent of Congress in repealing them.

Mr. BAXTER. I have no reason to think that. The fair trade laws were a mistake. They bear no resemblance to my present position. They had very harmful economic consequences.

Mr. LUKEN. Didn't they involve price maintenance?

Mr. BAXTER. Yes, indeed, they did. They authorized price maintenance across an enormous variety of commercial circumstances that bear no relationship whatsoever to the distinctions I am presently making.

Mr. LUKEN. What is the distinction? You seem to generally approve price maintenance across the board.

Mr. BAXTER. No, that isn't true.

Mr. LUKEN. You make some very broad statements to the fact there is no such thing as a vertical problem; isn't that what you say?

Mr. BAXTER. Yes, I have said there is no such thing as a vertical problem. Vertical arrangements can give rise to horizontal problems in some circumstances.

[Mr. LUKEN.] If there is no such thing as a vertical problem, then why are you opposed to the fair trade laws?

Mr. BAXTER. Because they gave rise to horizontal problems.

Mr. LUKEN. You have decided this?

Mr. BAXTER. They facilitated collusion among manufacturers in some circumstances and collusion among retailers in others.

Mr. LUKEN. But not between manufacturers and retailers.

Mr. BAXTER. Manufacturers and retailers deal together day in and day out. They necessarily have contractual arrangements of many kinds. Those arrangements sometimes give rise to horizontal problems, typically collusion. When they do, they are troublesome; when they don't, they are not troublesome.

Mr. LUKEN. You have been widely quoted in the Washington Post, and this quote comes through a number of these witnesses as to your disagreement with the present law. You are quoted as saying that the disagreement is not about the present state of the law so much as whether that law really makes sense; is that not your quote?

Mr. BAXTER. It probably is. I don't remember using exactly those phrases, but I have no difficulties with that.

Mr. LUKEN. Isn't that the law that the Congress passed that you are talking about?

Mr. BAXTER. No. That is the law that the Supreme Court has announced.

Mr. LUKEN. It is the law the Supreme Court has announced.

Mr. BAXTER. Right.

Mr. LUKEN. You are saying that doesn't make sense.

Mr. BAXTER. That is correct.

Mr. LUKEN. That doesn't give you any problem that you are making these statements that it doesn't make sense and that your avowed purpose is to change that law rather than to carry it out?

Mr. BAXTER. No, it doesn't give me any problem at all.

Mr. LUKEN. Did we hire you as an advocate to change the law?

Mr. BAXTER. The President appointed me explicitly for that purpose.

Mr. LUKEN. To change the law? Maybe we should be the President. Did he state that in your commission?

Mr. BAXTER. No, I didn't talk with the President. I should have said the Attorney General did.

Mr. LUKEN. When he gave you your commission, was that in writing to change the law?

Mr. BAXTER. No. It was oral.

Mr. LUKEN. Was it public?

Mr. BAXTER. We understood it to be an important part of the job. (p. 170-77.)

Excerpts from Joint Hearing Before Senate Small Business Committee and the State, Justice, Commerce and the Judiciary Subcommittee of the Senate Appropriations Committee, Sept. 9, 1982

Senator NUNN (Georgia). So if you get the administration's [appropriation] submission, you will have enough resources to enforce the law of the land?

Mr. BAXTER. Yes, of course, and that does not mean every conceivable case that comes along, but we will have enough funds to do a thorough and responsible job of enforcing the antitrust laws.

Senator NUNN. Including those areas that you say are violations per se in terms of vertical price-setting? You will be able to enforce those areas, too?

Mr. BAXTER. I have no idea in advance how many cases will come along.

Senator NUNN. But you think you will be able to generally enforce that part of the law with the resources requested by this administration for fiscal 1983?

Mr. BAXTER. I think we will be able to enforce the great majority of cases where damage to consumers is likely to occur.

Senator NUNN. Well, it sounds to me as if you are right back to your position that you have a violation per se as declared by the Supreme Court, and you disagree with that on a policy basis, you think that decision is wrong. It sounds to me as if you are still clearly saying that even if you get the resources you requested in 1983, that you are going to relegate those cases to a very low priority.

Mr. BAXTER. I am.

Senator NUNN. And in all likelihood there will not be cases brought in that area.

Mr. BAXTER. I will relegate them to a low priority.

Senator NUNN. That really means that the law of the land is not being enforced by the antitrust division of the Department of Justice.

Mr. BAXTER. No, it doesn't.

Senator NUNN. Well, I think if the FBI were to announce that kidnapping was no longer of great harm to society and that they were going to put kidnapping at the bottom of their enforcement list, we would have in effect a change in the law by the FBI.

Senator RUDMAN. I think we might also hear from our constituents.

(Laughter.)

Senator NUNN. I think we are going to hear from them on some of the statements that have been made today by Mr. Baxter, too, because you can change the law simply by not enforcing it, can you not?

Mr. BAXTER. Not in any very significant ways, but certainly one can shift priorities, yes.

Senator NUNN. Well, particularly, you have changed the law if you have announced those priorities very clearly so that everyone engaged in certain practices that are illegal per se now knows that that is such a low priority that you will not enforce it.

Mr. BAXTER. No, there is another very important—

Senator NUNN. It seems to me, Mr. Baxter, you have changed the law of the land.

Mr. BAXTER. No, that is not correct.

Senator NUNN. In practical effect.

(Transcript, at 53-55)

* * * *

Senator GORTON (Washington). I fully share the concern expressed by the chairman of this committee, Senator Weicker, about the administration's enforcement of the Nation's antitrust laws. I also feel a sense of deja vu.

Mr. Baxter and other administration spokesmen have come to Capitol Hill on numerous previous occasions in order to discuss this subject with concerned Members of the Congress. It is the fact that we have been here so many times before that bothers me most.

On December 1 of the last year I chaired a hearing of the productivity and Competition Subcommittee of this committee on precisely the same subject as this morning's hearing. Mr. Baxter was a witness, and he heard a number of strong statements by Senators and representatives of the small business community, very much like those you will hear today. That was only one of a long series of similar hearings before a number of Senate and House committees dating back to early in the first session of the 97th Congress.

This process began when Mr. Baxter and other top administration antitrust officials began making public statements which indicated that they disagree with some of the laws on the books, or with a clear line of Supreme Court precedents interpreting them. Those responsible for enforcing the Federal antitrust laws seems to believe that some of those laws are excessive, inefficient, or unwarranted.

The reaction of the Congress to these public statements was swift and strong. Many Members, representing both parties and the entire political spectrum, have seriously questioned the wisdom of abandoning the traditional enforcement approach in areas such as mergers, vertical restraints, price discrimination, and predatory pricing.

Frankly, it bothers some of us to see such a sudden, significant departure from previous longstanding policies which were pursued by Republican and Democratic administrations alike. We are bothered because these changes seem to be based on the wholesale adoption of economic theories which are the subject of great dispute, at least in their practical application.

It concerns some of us to see the economic efficiency considerations underlying the antitrust laws emphasized to a point of ignoring entirely the important social and political considerations which clearly also motivated Congress in passing antitrust statutes. It especially bothers many of us on the Small Business Committee to see apparent abandonment of the congressional purpose to preserve small business for its own sake.

Small companies are primary generators of new jobs. Dollar for dollar, they are much more innovative than large enterprises. They tend to be especially responsive to the needs of the surrounding communities. A vigorous small business community is obviously a most important element and asset for the economic recovery of this Nation.

The democratic principles of decentralization of economic and political power which helped move the Congress in

passing the Sherman and Clayton Acts are being viewed today with a renewed sense of importance.

Philosophical disagreement is not the primary concern, however. Congress has been most upset by strong implications from administration spokesmen that they do not intend to ask the Congress to change laws with which they disagree but rather will attempt unilaterally to mold the laws to fit their philosophy through an announced policy of selective enforcement.

The public statements have sent a message to the business community that certain defined conduct, previously considered unlawful, will be tolerated by the administration at least in certain circumstances. Antitrust lawyers, business executives, and Wall Street financiers have stated that these signals have already been received. Business conduct is in fact being adjusted accordingly, especially in the merger and vertical restraint areas.

The most recent example of the transmittal of such signals is represented by the August 13 Washington Post interview with Mr. Baxter. He is quoted in that article as saying that although he recognizes that resale price maintenance is per se unlawful under existing law, he disagrees with that rule and he intends to enforce it only in most limited circumstances.

Although executive discretion in the allocation of limited resources for enforcement is certainly necessary, it is clearly improper for the administration to announce a tolerance policy for certain types of law violations and thus, in effect, to amend legislation by fiat. Despite continuous loud and strong complaints from the Congress, however, this practice continues. (Transcript, at 59-62)

* * * *

Mr. BAXTER. We are busily about the process of attempting to achieve law reform in one of the permissible places for us to achieve law reform; that is to say, in the process of

interpretation by the courts. That is where the errors have been made, and that is where the remedy is most effectively sought. (Transcript, at 64)

Excerpts from Speech by James C. Miller, III, Chairman of the Federal Trade Commission, to Japan Federation of Economic Organizations, Aug. 23, 1982
(As appearing in 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1079, at 379 (August 26, 1982))

FTC Chairman Questions Enforcement of R-P Act

On his current to trip to Japan on official business, FTC Chairman James C. Miller III criticized enforcement of the Robinson-Patman Act.

Addressing the Japan Federation of Economic Organizations on Aug. 23 in Tokyo, Miller said that "merely episodic" price discrimination "may well represent a first step in the breakdown of rigid or collusive pricing or a device for entering a new market at efficient scale and deserve applause rather than prohibition."

Miller's conclusion came as part of a brief discussion of how economic theory can contribute to law enforcement decision-making. He first explained: "The economic concept of price discrimination that is usually at issue involves the sale of goods or services by a firm to two or more different customers at prices which bear a different ratio to the seller's marginal cost of making each sale."

He continued: "In simple language, the seller takes advantage of the greater intensity with which some of his customers demand his product by extracting a larger profit from them than from customers with less intense demand. Without going into a lengthy explanation, the economic objection to such a practice is that it reflects the existence of monopoly power and consequent misallocation of resources."

Miller then noted that the Robinson-Patman Act "makes no direct reference to economic analysis" and has not always been interpreted either as narrowly or as broadly as economists would interpret it. Miller said the economic literature "is largely critical" of the

Act, "often taking the view that the discrimination which actually injures competition and consumers could be successfully attacked under the Sherman Act."

However, Miller conceded that he does not have "the luxury of ignoring antitrust laws with which I might disagree, since I am charged with enforcing the statutes which are on the books." He added: "I do believe, however, that an exercise of prosecutorial discretion, mindful of the Commission's overriding duty to serve the cause of competition and consumer welfare, can shape our enforcement of price discrimination law to these ends."

The Chairman continued: "Thus, when persistent price discrimination reflects the abuse of a dominant or powerful market position either by seller or buyer, we will attack it vigorously. Price discrimination which is merely episodic, however, may well represent a first step in the breakdown of rigid or collusive pricing or a device for entering a new market at efficient scale, and deserve applause rather than prohibition." . . .

Petitioner's Reply Brief

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v.

VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

FALLS CITY'S MEETING COMPETITION DEFENSE UNDER SECTION 2(b)

In our main brief,[1] we showed that Falls City's prices in Henderson, Kentucky, while lower than its prices in Evansville, Indiana, were justified by the need to meet competitors' prices in Henderson. This established a meeting competition defense under Section 2(b) of the Robinson-Patman Act. (Falls City Br. 10-21) We showed further that there was no basis for the rulings below that the defense was unavailable because Falls City had adopted an area-wide price response, as opposed to

[1] Falls City's main brief will be cited as "Falls City Br.," the Brief for Respondent as "Vanco Br.," and the Brief for the United States As Amicus Curiae In Support of Reversal as "Amicus Br."

customer-by-customer responses, or because there was no reduction from a generally applicable price level. (Falls City Br. 11-14, 19-21) The government agencies responsible for enforcement of the antitrust laws have also demonstrated that these rulings, if upheld, would limit the meeting competition defense in a way that is "inconsistent with the language and purpose of the Section 2(b) defense and is totally at odds with the broader purposes of the federal antitrust laws." (Amicus Br. 30)

In this Reply, we deal with Vanco's efforts to avoid facing the merits of the Section 2(b) defense; with its vain attempt to defend the untenable legal propositions relied on by the courts below; and with its severe distortions of the undisputed facts of record.

1. Vanco seeks to evade the merits of the meeting competition defense under Section 2(b) by claiming that the "price system" issue "is . . . not presented by this case at all." (Vanco Br. 53) It argues that the courts below are not properly charged with having rejected the validity of a price system under Section 2(b) because they did not even mention the term "price system," and never "said that the defense was unavailable" but simply made a factual assessment. (Vanco Br. 4, 47-49 & n.69) That is plainly wrong.

The courts below clearly focused on the legitimacy, as a matter of law, of responding to competitors' prices by a price system in the form of area-wide prices. The district court explicitly condemned Falls City for failing to adjust "prices on a customer to customer basis" and for its adoption of a "uniform price." (Pet. App. 37a, 49a) In affirming, the Seventh Circuit stressed that Section 2(b) " 'places emphasis on individual situations, rather than upon a general system of competition,' " and does not justify "the adoption of a competitor's discriminatory pricing structure." (Pet. App. 9a) Judge Swygert, in dissent, cogently criticized the rejection of Falls City's meeting competition defense on the ground that it

had adopted a lower area-wide price in Kentucky. (Pet. App. 15a-17a) He disagreed with the proposition "that Falls City could not meet a general range of competitors' prices in Kentucky by instituting a single competitive price." (Pet. App. 16a) The principal issue before this Court is to determine, as Judge Swygert stated, that "the adoption of a single pricing system is a perfectly reasonable and proper method of meeting competition. That is all Falls City did in this case." (Pet. App. 17a)

2. The plain terms of Section 2(b) provide the complete answer to Vanco's legal arguments against Falls City's meeting competition defense. The statute provides that the defense is established when it is shown that a seller's "lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . ." As shown in our main brief and by the government amici, this provision precludes the purported requirements that (1) the lower price response must be on a customer-by-customer basis, or (2) the price differential must result from a price reduction from a pre-existing general price.

(a) In this Court, Vanco apparently realizes that it has to accept the validity of adopting a territorial price system in response to competition. (Vanco Br. 54-55)[2] Its fall-back position is that, nevertheless, it is not permissible to implement an "area price system" in any "area" that is smaller in scope than a defined "geographic market." (Vanco Br. 53, 56) This supposed condition has no basis whatever in the language of Section 2(b), and would conflict with the purpose of the provision. Section 2(b) permits a firm to meet lower competitive

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[2] Vanco is forced to this concession by the unequivocal holdings of the cases cited in our main brief (Falls City Br. 13-15, 17-18), particularly *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *petition for cert. filed*, 51 U.S.L.W. 3026 (U.S. June 12, 1982), and *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

prices "in good faith" and hence to implement an area price that is legitimately responsive to the " 'price competition to be met,' " *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1045 (9th Cir. 1981), *petition for cert. filed*, 51 U.S.L.W. 3026 (U.S. June 12, 1982). This must be true regardless of the scope of the area and its relation to a defined geographic market. Otherwise, a seller would be impotent to respond to lower competitive prices prevailing in a zone or region within a relevant geographic market.

In this case, the "price competition to be met" was that of other beers in Henderson. Even if Evansville and Henderson were correctly found to comprise a single geographic market, it was never disputed that there were different and lower prices in the Henderson area. Indeed, the district court expressly found that competing brewers established prices for the "Kentucky portion of the relevant geographic market area that were lower than their prices . . . in the . . . Indiana portion of the relevant market area." (Pet. App. 45a) That finding, which has not been challenged, completely defeats Vanco's fallback argument.

(b) The courts below erroneously relied upon the absence of price reductions by Falls City in Henderson (Pet. App. 9a-10a, 49a), and Vanco repeats that unsound argument (Vanco Br. 34-36, 56 & n.86). But this is irrelevant under the statute, which simply requires proof that Falls City's "lower price" in Henderson was "made in good faith to meet an equally low price of a competitor . . . ." (Falls City Br. 19-21; Amicus Br. 23-24)

Not only is the argument untenable under the statutory language, it is wrongheaded policy, particularly in an inflationary period. During an inflationary trend, as in the past decade, the only available form of competitive response may be to make moderate—rather than substantial—price increases. An interpretation of Section 2(b) which required an actual price cut from a pre-existing

general price would severely curtail the vital pro-competitive role of Section 2(b). (*See* Amicus Br. 23)

Vanco now apparently concedes the point, acknowledging that "[a] seller might . . . prove that . . . it had raised prices generally in a nondiscriminatory manner, *except as to certain customers for whom the competition was so intense as to preclude the normal price increase.*" (Vanco Br. 35) (emphasis added) This pivotal concession merely confirms the obvious: There is no distinction in logic or in the Robinson-Patman Act between reducing a price to meet competition and being unable to raise a price for the same reason. (*See* Swygert dissent, Pet. App. 16a-17a; Amicus Br. 22-23) Here, the record is clear that lower Kentucky beer prices made it competitively impossible for Falls City to charge the higher Indiana prices in Henderson.

3. Vanco also seeks to avoid the merits of Falls City's Section 2(b) defense by charging Falls City with collusive pricing. This is a transparent attempt to reargue its price fixing allegations, which the district court flatly rejected, finding "no evidence that the defendant set its prices . . . pursuant to an agreement with any other brewer . . . ." (Pet. App. 45a) Although Vanco did not appeal the dismissal of its price fixing count, its brief to this Court is replete with innuendo that Falls City was engaged in "anticompetitive pricing" (Vanco Br. 4 n.5), "price parallelism" (p. 4), "noncompetitive, cooperative price maximization" (p. 5), "conscious price parallelism" (p. 15), "noncompetitive behavior" (p. 22), "price signalling" (p. 23 n.30), and was charging "artificially high oligopoly prices" (p. 43). Absent proof of conspiracy, however, these epithets have no legal significance and cannot defeat Falls City's legitimate meeting competition defense.[3]

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[3] The record demonstrates that the difference in brewers' prices between Evansville and Henderson came about, not from collusive pricing, but as a result of a framework of state laws that caused

Nor is there any basis for Vanco's suggestion that Falls City could not meet competitors' prices in Henderson because those prices were inherently discriminatory. (Vanco Br. 42-45 & n.59) Vanco submitted no evidence that the prices of other brewers were unlawful under the Robinson-Patman Act, and the legality of those prices was not adjudicated below. Indeed, neither Vanco nor any other Evansville distributor was shown to have ever challenged the pricing practices of other brewers;[4] and, in view of the success other brewers enjoyed in Evansville, there was no reason for Falls City even to suspect they violated Section 2(a).[5] For this and other reasons fully discussed in our main brief (Falls City Br. 17-19) and by the government amici, the facts here are in "sharp contrast" to the collusive and plainly injurious basing-point system presented in *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945). (Amicus Br. 16-20) Accordingly, as the government brief aptly points out, since Vanco failed to prove any unlawful pricing, "Falls City was under no obligation to demonstrate that the prices it was constrained to meet were lawful." (Amicus Br. 27)[6]

Indiana and Kentucky to develop distinct structures of brewers' and wholesalers' prices. (*See* Falls City Br. 3-4 & nn.1, 2; Amicus Br. 8) Thus, Indiana and Kentucky laws forbid out-of-state wholesalers from selling to retailers in their respective states, while Indiana law also compels brewers to charge the same price to all wholesalers in Indiana, thereby diminishing the vigor of price competition in that state.

[4] Vanco's President, Mr. Schmadel, testified in deposition that he had observed no adverse impact of the Indiana-Kentucky price differential on Vanco's sales of the Heileman and Anheuser-Busch brands. (DX 66 at 198-99)

[5] *See* Falls City Br. 22-23; Pet. App. 56a-58a.

[6] In fact, Vanco now concedes that the meeting competition defense does not always require a seller "to determine whether its competitors' prices are legal before meeting them" and argues only that the defense is unavailable where there is "knowing participation in a discriminatory or illegal pricing pattern in the absence of genuine price competition," which it claims "occurred in this

4. Vanco's labored factual attack on Falls City's meeting competition defense is wholly unsupportable. It contends that the defense was factually insufficient because Falls City's lower Kentucky prices were not a "defensive response to competition" but resulted "from a decision to adopt its competitors' artificially high Indiana prices." (Vanco Br. 47-48) Again, the fallacy of Vanco's position is starkly revealed. Since the district court rejected Vanco's price fixing charge (Pet. App. 45a), the concept of "artificially high" prices is without legal significance. Falls City followed its competitors' Indiana prices as it was entitled to do; it followed the lower Kentucky prices as it was obliged by competition, and specifically allowed by Section 2(b), to do. As the government amici note, "so long as Falls City is able to demonstrate that its price disparity resulted from a reasonable and prudent commercial reaction to competitive conditions, it has complied with the demands of Section 2(b)." (Amicus Br. 24)

Here, the evidence is uncontradicted that Falls City was making such a "reasonable and prudent" response, and Vanco's claim that Falls City "introduced absolutely no evidence of the competitive analysis" that led it to adopt lower prices in Kentucky is patently absurd. (Vanco Br. 52) In fact, Falls City's President, Mr. Tate, testified in detail as to the analysis followed in setting the Indiana and Kentucky prices. He made clear that as a "very small brewer" Falls City was a price follower (Tr. 935, J.A. 86), and that it followed the

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case." (Vanco Br. 44 n.59) Vanco, however, failed to prove illegal price fixing, and the existence of a "discriminatory" pricing pattern, absent illegality, is without legal significance. *See Report of the Attorney General's National Committee to Study the Antitrust Laws* 181-82 (1955); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 220-23 (1962); *Callaway Mills Co.*, 64 F.T.C. 732, 750-54 (1964) (Comm'r Elman dissenting), *rev'd*, 362 F.2d 435 (5th Cir. 1966); *see FTC v. Standard Oil Co.*, 355 U.S. 396, 399 n.4 (1958).

prices of such leading non-premium brands as Pabst, Stroh's and Sterling. (Tr. 931; Tr. 935, J.A. 86) Mr. Tate described how he obtained competitive price information, pointing out that "it is not hard to get information" since many of Falls City's distributors also handled competitive brands. (Tr. 935-36, J.A. 87) He testified also that with regard to Kentucky, Falls City's salesmen would bring in "Xerox copies of other brewers' . . . price quotation to distributors"; that "[i]t was this kind of information that we used to stay competitive price-wise in the marketplace" (Tr. 949, J.A. 92); and that Falls City utilized information received from its salesmen and distributors in making its Kentucky pricing decisions throughout the relevant time period. (Tr. 949-53, J.A. 92-95)[7] Finally, Mr. Tate testified that a failure to keep its prices competitive with those of its rivals would have been "disastrous" for Falls City, and that any attempt to charge the Indiana prices in Kentucky would have put Falls City "in the premium price bracket, which we weren't able to get," and would have hastened Falls City's demise. (Tr. 935, 945, J.A. 87, 90)

Moreover, contrary to the smoke screen of confusion Vanco seeks to create in this Court, its proposed findings of fact in the district court flatly conceded that throughout the relevant period Falls City was meeting the lower Kentucky prices of its competitors.[7] That concession was

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[7] Thus, in its proposed post-trial findings of fact, Vanco stated: "During the period 1972-1978, Falls City charged distributors in Indiana more for beer than it charged distributors in Kentucky . . . . Falls City competed against essentially the same brewers in Kentucky as in Indiana, and all of Falls City's competitors sold beer to Kentucky distributors at lower prices than they sold beer to Indiana distributors . . . . That situation existed from at least May of 1972 through June of 1978." Plaintiff's Proposed Finding of Fact 136. Furthermore, in its Proposed Finding of Fact 177, Vanco cited to the district court the following testimony of Mr. Tate, which had been elicited by Vanco's counsel:

> Q: Is it a fact that your competitors in the brewing industry, that is the brewers you listed that were the leading sellers

compelled by the uncontroverted trial and deposition testimony of Mr. Tate, and the price data for Indiana and Kentucky that are summarized at Pet. App. 63a-64a. Those data show that Falls City's prices closely paralleled those of its competitors in both states.[8] In Kentucky, some of Falls City's competitors established state-wide prices while others set prices on a zone basis. Falls City responded with a state-wide price that met the median range of those prices.[9] Thus, Falls City's lower Henderson price was a "reasonable and prudent" effort to respond to the competitive conditions prevailing in that market.

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in Indiana and Kentucky, sell beer at higher prices in Indiana than they do in Kentucky?

A: Yes, sir.

Q: Has this existed as long as you have been with the Falls City Brewing Company?

A: Yes, sir.

Q: And is that the reason why you sell your beer at the prices you do sell them in Kentucky?

A: Yes, sir.

Q: Is that why you sell at the prices that you do in Indiana?

A: Yes, sir.

These proposed findings of fact, and the evidence on which they are based, completely refute Vanco's preposterous suggestion that Falls City officials "had very little idea of what the Kentucky prices were." (Vanco Br. 52).

[8] Pet. App. 63a, 64a. Vanco misstates the facts as to the Indiana prices, claiming that Falls City in 1974 to 1976 priced itself "out of the market" in Indiana because its brands "became more expensive than brands of Falls City's primary competitors." (Vanco Br. 17, 19) This is false and is based on a highly selective and misleading use of only a portion of the available price data for Indiana, such as the single package size cited at Vanco Br. 17. Examination of the entire range of package sizes shows that Falls City's prices were in line with, and on many packages were below, those of its principal competitors. (*See* Pet. App. 64a)

[9] Vanco argues that Falls City should have established a separate pricing zone for the Henderson area instead of a state-wide price and implies that competitors who had price zones had higher prices in Henderson than elsewhere in Kentucky. (Vanco Br. 45 n.64, 50-

5. The bankruptcy of Vanco's position on the Section 2(b) issue is further betrayed by its contention that "[t]he mere fact that Falls City's competitors may also have been charging more in Indiana than Kentucky . . . does not establish the defense." (Vanco Br. 44) According to Vanco, Falls City had to show "not mere price parallelism, but competitive necessity." (*Id.*) Neither the language nor policy of Section 2(b), however, requires a showing of "competitive necessity" beyond the inherent necessity for a seller to meet the lower competitive offerings of its rivals. As this Court has held, the central test under Section 2(b) "is whether a seller can 'show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82 (1979). The statute does not contemplate an obstacle course of additional requirements as urged upon this Court by Vanco.[10]

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51) These arguments are flagrantly misleading. In fact, several brewers (including Stroh's) had state-wide prices, while Pabst's Henderson prices, although minimally above its prices in other Kentucky zones, were substantially beneath Falls City's Indiana price. (DX 28, J.A. 192, 194, 218) Accordingly, even if Falls City had elected to establish a Henderson pricing zone, its price there would have had to be virtually the same as its state-wide Kentucky price in order to be competitive with Stroh's and Pabst. (*See* Pet. App. 63a-64a) Vanco also is mistaken in relying on a partial price survey prepared in late 1976. (Vanco Br. 51) That survey confirms the continued existence of a substantial f.o.b. price disparity between Indiana and Kentucky, with, for example, a difference of 40 cents per case between the Stroh's Kentucky price and Falls City's Indiana price for the same package. (DX 14, J.A. 182-85) The latter plainly would have been out of the competitive ballpark for Kentucky, and Falls City, therefore, properly set Kentucky prices which approximated the Kentucky prices of comparable non-premium brands.

[10] Vanco's laundry list of factors Falls City would have to prove (Vanco Br. 44-45) demonstrates the absurdity of its argument. It claims Falls City failed to establish "any competitive pressure" to

6. Finally, Vanco suggests that Falls City should have followed a different pricing strategy in Indiana and should have foregone price increases and targeted itself to a different segment of the market. (Vanco Br. 17-19) Apart from the irrelevance of the argument, this entirely misconceives the policy of Section 2(b), which is not to rigidly confine or override business decisions, but to enable firms to respond realistically and competitively to market situations. *See Standard Oil Co. v. FTC*, 340 U.S. 231, 250 (1951); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3120 (U.S. July 26, 1982).[11] Falls City's action in setting the challenged prices in Henderson was clearly within the scope of the Section 2(b) defense.

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match its competitors' Kentucky prices. Clearly, however, such pressure is inherent in the undisputed existence of lower prices. Vanco claims the Indiana prices were "artificially high" and not "normal." But, on this record, there is no basis for finding that Indiana prices were anything other than market prices that Falls City was entitled to follow. Vanco charges that Falls City's Kentucky prices were lower than those of certain of its competitors "as of 1976." We have shown, however, that Falls City attempted at all times to follow the prices of comparable brands and that neither Falls City nor any other brewer was able to charge the higher Indiana prices in Kentucky. The fact that Falls City's Kentucky price may have been minimally below those of certain competitors at one point in time cannot defeat the Section 2(b) defense. *United States v. United States Gypsum Co.*, 438 U.S. 422, 453-54 (1978). Finally, Vanco suggests there was no "price system" for Falls City to meet since some of its competitors had different prices in different zones within Kentucky. This is patently frivolous. Falls City adopted an area-wide price as its system for meeting its competitors' range of lower prices in Kentucky. None of those competitors set prices on a customer-by-customer basis but used either a uniform state-wide price (*e.g.*, Stroh's and Miller) or used pricing zones which typically included a number of counties.

[11] Thus, it was within Falls City's business discretion not to try to transform itself into a low-price beer on the ground, as testified, that any temporary benefit would be offset by the resulting loss in profits. (Tr. 946-47, J.A. 90-91)

II.

COMPETITIVE INJURY UNDER SECTION 2(a)

In our main brief, we also showed that the courts below erred in finding competitive injury under Section 2(a) of the Robinson-Patman Act. Undisputed competitive facts negated such a finding, and reliance upon this Court's *Morton Salt* decision for a presumption of injury was untenable.

1. The Seventh Circuit is conspicuous among the lower courts which have misapplied *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), in considering the requisites for competitive injury under Section 2(a). In its own words, the court below has "gone even further" than *Morton Salt* and held that "any substantial, sustained differential between competing resellers is *prima facie* injurious." *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972) (relied upon in this case, Pet. App. 7a-8a). This view of the Seventh Circuit and some other courts has been widely criticized by authoritative commentators and should be overruled. (*See* Falls City Br. 30)

Falls City's position, consistent with the commentators, is that *Morton Salt* may arguably permit an inference or presumption of competitive injury when there is evidence of large buyer preference (as in *Morton Salt*) or, in a primary line case, evidence of seller predation. (*See* Falls City Br. 30-31) Absent such facts, however, a per se or presumptive rule of competitive injury is out of place, and courts should be required to make a realistic appraisal of the competitive facts. *FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963). Contrary to Vanco's assertion, Falls City has not claimed that a plaintiff challenging price discrimination "must prove both injury *and* large buyer preference." (Vanco Br. 66) (emphasis in original) We have insisted that, in the present case, there was no basis for any presumption of competitive injury, and that the evidence is legally insufficient to support the lower court's finding of competitive injury.

2. Vanco makes a strenuous effort to defend the Section 2(a) finding on a factual basis. (Vanco Br. 57-66) It is forced to admit, however, that "[t]here were other [market] forces at work" that help explain its decline in sales of Falls City beer, apart from the difference between Falls City's f.o.b. prices for Indiana and Kentucky. (Vanco Br. 61) These "other forces" contradict Vanco's claim. Undisputed facts demonstrate there was no causal connection between the f.o.b. price differential and the alleged injury to Vanco.

A few examples will suffice to make the point. First, it is undisputed that in a group of thirteen central Indiana counties, including the cities of Indianapolis, Muncie and Lafayette, Falls City beer sales dropped at an even more precipitous rate than in Evansville. This was definitive proof that the price differential at the Kentucky border was not a determinative factor in Vanco's Falls City sales decline. (Falls City Br. 27) Vanco disingenuously complains that Falls City "has given no indication" why it chose "a few central Indiana counties" as a basis for comparison. (Vanco Br. 65) But the data are of obvious relevance. These were not "a few" counties but a contiguous block of thirteen mid-state counties containing major population centers comparable to Evansville.[12] If the challenged price differential between Evansville and Henderson were a significant causal factor, Falls City beer should have fared better in such comparable areas in central Indiana which were unaffected by the differential. Instead, it fared worse—losing about 61 percent in the thirteen counties as a group from 1972 to 1977, including losses of 66 percent in Muncie, 64 percent in Lafayette and 61 percent in Indianapolis, as compared to

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[12] DX 6, Pet. App. 55a. Vanco also seeks to belittle the comparative data by citing one Indiana county in which Falls City sales were minimal, claiming that changes in sales give exaggerated statistical results. (Vanco Br. 65 n.98) But Falls City relied upon the entire group of thirteen counties as well as on the major metropolitan centers in that area that were comparable in sales volume to Evansville.

Vanco's loss of 58 percent in Evansville. The brand's steep decline in those mid-state markets is compelling refutation of Vanco's claim.

Second, Vanco concedes, as it must, that other brands of beer were highly successful in Evansville during the period of Falls City's decline. It argues that "any tangential relevance" of this fact "would have to be based on some showing that they suffered a price discrimination commensurate to that suffered by Vanco, and that it did not affect them." (Vanco Br. 61) But that is precisely what was demonstrated. Falls City showed that all brands of beer were subject to a price differential between Evansville and Henderson, as the district court found. (Pet. App. 45a) Falls City further showed that, notwithstanding the differential, major brands grew in Evansville over the period, in many cases exceeding their rate of growth in Indiana as a whole. (Falls City Br. 4-5, 22-23) This proved that it was the impact of the major brands on Falls City's sales, not any diversion of its sales to Henderson, that essentially accounted for Vanco's decline in Falls City sales. (*See* Falls City Br. 23)

Third, we have shown that there was no correlation between Vanco's Falls City sales and the amount of the f.o.b. price differential. (Falls City Br. 23-26; DX 15, J.A. 186-87) In response, Vanco claims that the impact on sales of Falls City's price discrimination was reduced by Vanco's efforts "to do a balancing act" and "to maintain its prices as low as possible"; that this "sometimes caused Vanco to reduce prices to unprofitable levels to stem the loss of volume," and at other times caused it to lose sales volume. (Vanco Br. 62-63) This is pure fiction. There is no evidence that Vanco *ever* reduced prices in response to competitive events in Henderson; indeed, Vanco's President testified that he set prices according to Vanco's competition in Evansville and did not take account of Henderson prices. (Falls City Br. 6, 24-26)[13] Furthermore, on

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[13] Vanco claims it reduced its prices in 1976 "in order to reclaim volume lost to Kentucky retailers." (Vanco Br. 63 n.96) This

several occasions when it received a price increase from Falls City, Vanco raised its prices to retailers by more than the increase in the f.o.b. price, thereby increasing its gross profit margin. On other occasions, it raised its wholesale price when the wholesaler in Henderson had made no increase in its wholesale price. (DX 54, Pet. App. 59a; DX 62, Pet. App. 60a)[14] These facts refute the alleged impact on Vanco of the differential in wholesale prices.

3. Vanco's vulnerability on the issue of competitive injury is shown by its attack on a "straw man," an alleged contention by Falls City that "its own business difficulties should somehow excuse it from liability." (Vanco Br. 68) That is a total distortion of Falls City's position. We never cited declining market position as an "excuse" for a violation. Rather, Falls City demonstrated that it was the precipitous decline of its sales in all markets, not any alleged loss of sales due to the Indiana-Kentucky f.o.b. price differential, that explained Vanco's decline in Falls City sales. The real loss to competition came from Falls City's forced withdrawal from the beer business, not the acts it performed to try to stay afloat. Like the courts below, Vanco ignores not only the

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is fictitious. Vanco's President gave no reason whatsoever for the 1976 price cut. (J.A. 78-79) He did testify that Vanco's prices were set in order to meet its *Evansville* competition (Falls City Br. 24), and in late 1976 Vanco's wholesale prices for Falls City did, in fact, match the Evansville prices of comparable brands. (DX 14, J.A. 182-84) Moreover, at the time Vanco made this decrease, there had been no change in either the f.o.b. brewery price for Kentucky or in the wholesale price being charged for Falls City beers by the Henderson distributor. (DX 54, Pet. App. 59a; DX 62, Pet. App. 60a)

[14] Thus, in the summer of 1974, Vanco chose to raise its prices and gross margins on Falls City beers. At the same time, the Henderson distributor kept its prices of Falls City beers stable. (*See* Falls City Br. 24-26) That was the only year in which the Henderson distributor experienced a gain rather than a loss in Falls City sales. (DX 51, Pet. App. 54a)

causal significance of Falls City's sales decline in all markets, but also the massive growth of the major national brands during the same relevant time period.

The absurdity of Vanco's position is that, if the f.o.b. price differential truly caused significant cross-over sales from Evansville to Henderson, then Vanco should have similar and stronger Robinson-Patman Act claims against Anheuser-Busch, which has become its principal supplier. (PX 95, J.A. 145) Vanco has not advanced such claims, presumably because its sales of Anheuser-Busch increased significantly, notwithstanding the price differential. (PX 95, J.A. 145; DX 9-10, Pet. App. 56a-57a; Pet. App. 62a) But that same fact refutes Vanco's claim against Falls City.[15]

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[15] There are other reasons to be skeptical about any alleged causal link between the f.o.b. price differential and so-called cross-over sales. As noted (*supra* n.14 and Falls City Br. 24-26), there was some evidence of cross-over sales in the summer of 1974, a time when Vanco's gross profit margins vastly exceeded those of the Henderson distributor, Dawson Springs. (*Compare* DX 54, Pet. App. 59a *with* DX 62, Pet. App. 60a) After 1974, however, Dawson Springs lost Falls City sales at the same rate as Vanco. (DX 51, Pet. App. 54a)

CONCLUSION

For the foregoing reasons, and the reasons stated in our main brief and in the government's amicus curiae brief, the judgment of the court of appeals should be reversed and the complaint dismissed.

Respectfully submitted,

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OCTOBER TERM, 1981

FALLS CITY INDUSTRIES, INC., PETITIONER

v.

VANCO BEVERAGE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

The United States will address the following question: Whether, as a matter of law, the meeting-competition defense prescribed in Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b), is available to a seller who adopts a state-wide price to meet the prices of its competitors.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1271

FALLS CITY INDUSTRIES, INC., PETITIONER

v.

VANCO BEVERAGE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Robinson-Patman Act is not construed in a manner that unnecessarily interferes with the primary objective of the antitrust laws —protection of the nation's competitive economic system. See *United States* v. *United States Gypsum Co.*, 438 U.S.

422, 458 (1978). The Federal Trade Commission, which has developed much of the Act's jurisprudence in administrative proceedings, shares this interest.

STATEMENT

1. Petitioner Falls City Industries, Inc. operated a brewery in Louisville, Kentucky [1] and sold beer f.o.b. its plant to wholesalers in Indiana, Kentucky, and 11 other states. Respondent Vanco Beverage, Inc. was the wholesale distributor of Falls City beer in Evansville, Indiana, a town located near the Kentucky border. Vanco did not compete directly with any of Falls City's Kentucky wholesalers because the law in each state permitted wholesalers to sell only to in-state retailers.[2] Indiana law also prohibited consumers who purchased packaged beer at retail outside the state from bringing it back into Indiana. Ind. Code Ann. §§ 7.1-5-4-1, 7.1-5-11-1 (Burns 1978); see Tr. 114-115, 135-136.[3] Vanco alleged, however, that beer retailers in Henderson County, Kentucky competed with its Indiana retailers in sales to consumers (Pet. App. 1a-2a). For a period of about six years, Falls City sold its beer to Kentucky wholesalers at f.o.b. prices lower than those charged to Vanco and other wholesalers in Indiana (Pet. App. 59a-60a). In so doing, Falls City generally followed the prices of larger brewers

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[1] After this suit was commenced, Falls City discontinued its brewery operation (Pet. App. 26a).

[2] See Ind. Code Ann. § 7.1-3-3-5 (Burns Cum. Supp. 1981); Ky. Rev. Stat. § 243.180 (1981). Indiana law provides that brewers must sell to all Indiana wholesalers at the same price. Ind. Code Ann. § 7.1-5-5-7 (Burns 1978).

[3] Approximately half of Vanco's sales of Falls City beer were to package stores; the other half were to establishments where beer was consumed on the premises (J.A. 233). Approximately 75% of the retailers served by Falls City's Henderson, Kentucky distributor were package stores (J.A. 49).

"Tr." refers to the transcript of the trial in the district court.

who sold beer to Kentucky and Indiana distributors (Pet. App. 10a, 16a-17a).[4]

Vanco sued Falls City in the United States District Court for the Southern District of Indiana, alleging that Falls City had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to maintain higher prices for beer in Indiana than in Kentucky. Vanco also claimed that Falls City had violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), by discriminating in price between Vanco and wholesalers in Kentucky, including Dawson Springs, Inc., a distributor doing business in Henderson County. Vanco claimed that the difference in f.o.b. wholesale prices affected retail prices and ultimately caused Vanco to sell less Falls City beer through Indiana retailers. Vanco sought treble damages and injunctive relief.

Falls City denied the Sherman Act allegation. As to the Robinson-Patman allegation, Falls City admitted that it charged lower f.o.b. prices to Kentucky distributors than to distributors in Indiana, but contended that: (1) Vanco had failed to show the injury to competition required to establish a prima facie case under Section 2(a); (2) Falls City had a complete defense under Section 2(b) of the Act, 15 U.S.C. 13(b), because its lower Kentucky prices were necessary to meet competition; and (3) Vanco had failed to prove damages under Section 4 of the Clayton Act, 15 U.S.C. 15 (see Pet. App. 7a-12a).

2. The district court dismissed Vanco's Sherman Act claim (Pet. App. 52a), finding that Vanco had failed to prove the alleged conspiracy (Pet. App. 45a-46a). It found, however, that Vanco had proven all the elements of a prima facie case of price discrimination under the Robinson-Patman Act (Pet. App. 28a, 30a-37a). The dis-

[4] For a comparison of Falls City's Kentucky prices with those of its competitors, see J.A. 92-94, 188-232. For a comparison of the prices of Falls City's competitors in Evansville, Indiana with their prices in Henderson, Kentucky, see J.A. 182-185.

trict court also found that Falls City had failed to establish a Section 2(b) meeting-competition defense because (Pet. App. 37a):

> Defendant was not interested and did not even contemplate adjusting prices on a customer to customer basis to meet competition from other brewers. The defendant's pricing policy was to have a uniform price in each of the thirteen States in which its beer was distributed irrespective of competitive geographic market area. With this statewide pricing policy prices of defendant's beer could not possibly be the same as its competing brewers [because] the Kentucky competitors had all kinds of prices.

The district court found that the aggregate amount of overcharges to Vanco was $575,293. Applying a rule of "automatic damages," the court entered judgment for treble that amount (Pet. App. 52a).

3. A divided panel of the court of appeals affirmed the district court's finding of liability on the Robinson-Patman claim and remanded for a redetermination of damages in light of this Court's decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).[5] The majority concluded that Vanco had proven injury to competition because it had shown that the differential between the f.o.b. prices charged by Falls City to Indiana and Kentucky wholesalers was great enough to influence retail prices and consumer purchases, and thus to curtail purchases by retailers from Vanco (Pet. App. 7a-9a).

The court also held that Falls City was not entitled to assert a meeting-competition defense because it had not shown that it "first adopted a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition" (Pet. App. 10a). It concluded that the defense was foreclosed to Falls City because,

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[5] Vanco did not appeal the district court's dismissal of its Sherman Act claim.

in charging a higher f.o.b. price to Indiana wholesalers, Falls City "was simply taking advantage of its competitors' policies of charging higher prices in Indiana than in Kentucky and other states" (Pet. App. 10a). The court of appeals construed this Court's decision in *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), to mean that the Section 2(b) meeting-competition defense is not available to a seller that adopts area pricing as a response to competitive market conditions (Pet. App. 9a-10a).

Judge Swygert dissented, concluding that, "as a matter of law," Falls City had established a meeting-competition defense (Pet. App. 15a).

SUMMARY OF ARGUMENT

I.

Ordinarily a seller whose products are sold in separate geographic markets can charge different prices in those markets without causing injury to competition among its customers. In this case, Falls City and the brewers with which it competed charged different prices for their beer in Indiana and Kentucky, and state laws made direct and indirect competition among their customers illegal. As a matter of fact, however, some competition occurred along the state border, because Indiana consumers crossed the state line into Kentucky to purchase cheaper beer.

A. Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b), permits petitioner to rebut a prima facie case of price discrimination by showing that its policy of charging a lower price in Kentucky was a good faith attempt to meet the equally low prices of its competitors. The legislative history of Section 2(b) shows that it was not intended to forbid territorial price differences altogether, but rather to make the permissibility of such differences turn on the competitive conditions facing the seller. The language of the meeting-competition proviso confirms that Congress did not intend to require individually negotiated prices in every case: it permits a seller

to charge a "lower price * * * to any purchaser *or purchasers*" when necessary to meet a competitor's lower price. This Court's decisions interpreting Section 2(b) also have emphasized that the crucial question "is whether a seller can 'show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 82 (1979), quoting *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 759-760.

In practical effect, territorial pricing is comparable to individually negotiated prices in markets where competitors also charge geographically uniform prices and information about their prices is freely available. Moreover, in some markets the possibility of arbitrage will render futile an attempt to negotiate individual prices. In addition, when a small firm sells a substantial number of different products, which it markets through numerous distributors in competition with many other sellers, the expense of individual negotiations could inhibit competition significantly, thereby frustrating the very purpose of Section 2(b).

B. This Court's decision in *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, does not preclude resort to the meeting-competition defense by all sellers who charge different prices in different territories. The basing-point system condemned in *Staley* was a tactic employed by a cartel to maintain prices at an artificially high level—the very antithesis of meeting competition. Falls City's price difference in the Indiana and Kentucky markets, by contrast, did not result from an agreement with other sellers. And it affected competition among beer wholesalers only in a narrow zone along the state border where, as a matter of state law, that competition was illegal.

II.

Once Falls City demonstrated that it was in fact meeting the lower prices of its competitors in the Ken-

tucky market, it was not required to make some further unspecified showing that it was acting in "good faith."

A. The "good faith" clause in Section 2(b) does not impose on sellers an additional element of proof, but rather is intended to relax the strictures of the meeting-competition defense for some sellers, who, though acting prudently, fail to meet the literal terms of the statute. Thus it may make the defense available to a seller who is unable to verify his competitor's price, or who actually beats (rather than meets) a competitor's "equally low price," or who could not have known that his competitor's price was illegal. See *United States* v. *United States Gypsum Co.*, *supra*; *Great A&P Tea Co.* v. *FTC*, *supra*.

B. In particular, Falls City is not disqualified from claiming the defense simply because the difference in its statewide prices occurred as a result of price increases in Indiana, rather than price decreases in Kentucky. The statute requires a seller only to justify "his lower price," 15 U.S.C. 13(b), not to "lower his price." The latter interpretation, advanced by Vanco and the courts below, would seriously undermine the utility of the meeting-competition defense, particularly in an inflationary economy. Falls City demonstrated that it could employ no other pricing strategy to meet competition without jeopardizing its financial interests. This was sufficient to satisfy the requirements of Section 2(b).

C. Vanco offered no substantial proof of an unlawful pricing agreement that would show that Falls City acted in bad faith. The district court rejected Vanco's claim under Section 1 of the Sherman Act, 15 U.S.C. 1, and Vanco did not challenge that ruling on appeal. Absent proof by Vanco that the prices being met were in fact illegal, Falls City was under no obligation to demonstrate the contrary. Vanco's argument that the Section 2(b) defense should not be available in any case of persistent price difference rests on a confusion of economic price discrimination with discrimination in the legal sense.

ARGUMENT

I. THE MEETING-COMPETITION DEFENSE PRESCRIBED IN SECTION 2(b) OF THE ROBINSON-PATMAN ACT PERMITS TERRITORIAL, AS WELL AS INDIVIDUAL, PRICE DIFFERENCES

When markets are widely separated geographically, or well insulated by other barriers, "and the conditions affecting those markets set different price levels for them, the sale to different customers at * * * different prices would not constitute a discrimination within the meaning of [the Robinson-Patman Act]." 80 Cong. Rec. 9416 (1936) (remarks of Rep. Utterback). See also F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 179-180 (1962). The reason is that since the seller's customers are not competing with one another, there is no injury to competition as required by Section 2(a).[6]

The controversy in this case arose because the statewide markets in which Falls City sold beer at different prices—although well insulated from each other by a combination of state laws—were adjacent rather than geographically distant. The laws in Indiana and Kentucky provided that beer could only cross the state line when it was sold from brewer to wholesaler. Wholesalers could only sell to in-state retailers (Ind. Code Ann. § 7.1-3-3-5 (Burns Cum. Supp. 1981); Ky. Rev. Stat. § 243.180 (1981)), and those to whom retailers sold packaged beer in Kentucky could not bring it back into Indiana (Ind. Code Ann. §§ 7.1-5-4-1, 7.1-5-11-1; Pet. App. 35a, 37a). Nevertheless, as the proof at trial showed (*id.* 32a-37a), these legal barriers were permeable as a practical matter; Indiana consumers travelled at least a short distance into Kentucky to bring back cheaper beer in violation of

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[6] Although in such cases there can be no injury to competition among the seller's customers, different prices in different markets may manifest an effort by the seller to injure competing sellers. There is no allegation in this case that Falls City, a declining regional brewer that only matched its larger competitor's prices, caused or intended to cause any primary-line injury.

the law if the price differential was great enough. The otherwise distinct state markets in which Falls City beer was sold thus overlapped for a distance of a few miles at the Indiana-Kentucky border. The legal question presented in this case is whether Falls City may rebut a charge of price discrimination by showing that it simply met its competitors' prices in the two states, notwithstanding the fact that the line between the two markets was slightly blurred.[7]

A. Territorial Pricing May Satisfy The Meeting-Competition Defense Of Section 2(b)

1. Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b), provides that a seller may rebut a prima facie case of price discrimination as defined in Section 2(a) of the Act, 15 U.S.C. 13(a), "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *." The court of appeals held that Falls City was not entitled to rely on that defense to justify the different prices charged to Vanco, an Indiana wholesaler, and Dawson Springs, a Kentucky wholesaler. What disqualified Falls City, according to the court, was that it had established a lower

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[7] The court of appeals agreed (Pet. App. 7a-9a) with the district court's finding (Pet. App. 32a-33a, 47a) that Vanco had established a reasonable probability of substantial injury to competition within the meaning of *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 47-49 (1948), because the price differential was "sufficient to influence retail prices." *Morton Salt* holds that injury to competition is established prima facie by proof of substantial price discrimination over time. *Id.* at 46, 50-51, 60. This showing may be rebutted by evidence that breaks the causal connection between a price differential and competitive injury. See F. Rowe, *supra*, at 182. In this case, the court of appeals reviewed the evidence in support of petitioner's claim that competition from major brands, not the price differential between Kentucky and Indiana, caused the competitive injury. While the FTC supports the *Morton Salt* standard required for a prima facie showing of legal injury, subject to rebuttal evidence, we take no position as to whether the court of appeals and the district court correctly assessed that factual issue in this case.

price throughout an entire territory (the Kentucky market), rather than establishing its price on a customer-by-customer basis in response to particular competitive offers (see Pet. App. 9a). An examination of the legislative history of Section 2(b), and this Court's decisions construing it, demonstrates that the court of appeals' interpretation is erroneous. Moreover, analysis of the practical effect of the court's holding shows that it is unjustified as a matter of policy.

The proviso currently found in Section 2(b) derives from a comparable provision contained in Section 2 of the original Clayton Act, 38 Stat. 730. That provision stated (emphasis supplied):

> * * * [t]hat nothing herein contained shall prevent * * * discrimination in price *in* the same or *different communities* made in good faith to meet competition * * *.

The House Judiciary Committee described the purpose behind the defense as follows:

> The policy of the antitrust laws is to foster competition, and is built upon the basis that this is the normal and desirable thing; [to withhold a meeting-competition defense] would tend to prevent competition * * *.
>
> [For example,] a concern trying to enter a new *territory* and seek new business would be * * * cruelly dealt with. It could not make any reduction in the new *territory* without at the same time reducing its prices everywhere else.

H.R. Rep. No. 627 (Pt. 2), 63d Cong., 2d Sess. 3 (1914) (emphasis supplied).

Congress believed that the original meeting-competition proviso had several weaknesses which the amended version in the Robinson-Patman Act was intended to rectify. Its original language was thought to allow predatory pricing below cost as a response to competition. See S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep.

No. 2287, 74th Cong., 2d Sess. 16 (1936); 80 Cong. Rec. 8235 (1936) (remarks of Rep. Patman). Moreover, it was said to allow large buyers to get lower prices simply by finding two sellers willing to offer them. 80 Cong. Rec. 9418 (1936) (remarks of Rep. Utterback); C. Austin, *Price Discrimination* 89 (1954). The aim of Congress in the amended section was to remedy those perceived evils and to restrict the defense to pricing practices actually justified by competitive conditions. 80 Cong. Rec. 3119 (1936) (remarks of Sen. Logan).

In revising the meeting-competition defense, Congress gave no thought to enacting an absolute prohibition against territorial pricing. As this Court noted in *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 241-242 (1951), the amended section no longer speaks of permitting "discrimination in price 'in * * * different communities.'" But the reason for the modification was to "restrict[] the proviso to price differentials occurring in actual competition." *Id.* at 242. "[T]he amendments fail to protect differentials between prices in different communities *where those prices are not actually competitive.*" *Id.* at 248 n.14 (emphasis supplied). Thus, there is no absolute bar to territorial price differences when they are in fact responses to competitive conditions.

The literal language adopted by Congress reinforces that conclusion. Section 2(b) specifically allows a "lower price * * * to any purchaser *or purchasers*," when necessary to meet a competitor's lower price. 15 U.S.C. 13(b). This clearly signifies that a single "lower price" may be extended to numerous "purchasers" to meet the forces of competition. As Rep. Utterback, House manager of the bill, emphasized, the new section *"leaves it a question of fact* to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, *and whether the way in which the competition was met* lies within the latitude allowed by those limitations." 80 Cong. Rec. 9418 (1936) (em-

phasis supplied). And as the Report of the House Judiciary Committee pointed out, it is lawful for a seller to meet "*local* competition" by taking action "to cut *local prices*." H.R. Rep. No. 2287, *supra*, at 16 (emphasis supplied).

2. Consistent with Congress' intent, this Court has interpreted Section 2(b) to harmonize it with the overall competitive goals of the antitrust laws, and has stressed that the competitiveness of pricing decisions must be evaluated as a question of fact. This Court repeatedly has emphasized that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great A&P Tea Co.* v. *FTC*, *supra*, 440 U.S. at 80 n.13; *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 458; *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74 (1953). There undoubtedly is some tension between the Sherman Act—which is based on the premise that the unrestrained individual decisions of buyers and sellers will result in maximum consumer welfare—and the restrictions imposed on the pricing decisions of sellers by the Robinson-Patman Act—which seeks to protect individual competitors as well as competition. See *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 450. But this Court has endeavored to minimize the conflict and to give effect to Congress' broader purposes. Thus, it has "warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Great A&P Tea Co.* v. *FTC*, *supra*, 440 U.S. at 80, quoting *Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 63.

In particular, this Court has stated that the decision whether a seller has satisfied the demands of Section 2(b) should be made by looking to the seller's good faith effort to maintain sales in the face of pressure from competitors' prices. *United States* v. *United States Gyp-*

sum Co., *supra*, 438 U.S. at 453. "The test for determining when a seller has a valid meeting-competition defense is whether a seller can 'show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *Great A&P Tea Co.* v. *FTC*, *supra*, 440 U.S. at 82, quoting *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 759-760. A seller who can make this showing has a complete defense to a charge of price discrimination even though injury may result to some of his customers. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951). In short, the decisions of this Court confirm that application of Section 2(b) turns on the seller's good faith effort to match the prices of his rivals, not on whether a given price is negotiated on an individual basis.

3. The employment of a territorial pricing strategy is not only consistent with the intent of Section 2(b) and the decisions of this Court interpreting it, but may also in certain circumstances be both practically necessary and economically desirable. In the first place, in a case such as this, a requirement of individual price negotiation may do no more than produce, at much greater expense to the seller, the same result as a uniform territorial price. This is not a case where information about competitors' prices was difficult to discover, or where individual discussions with wholesale customers were necessary in order to determine what price to meet. See *Beatrice Foods Co. and the Kroger Co., Inc.*, 76 F.T.C. 719 (1969); cf. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 453.[8] In 1972, for example, the Kentucky Department of Alcoholic Beverage Control required all brewers to disclose the prices they charged

[8] In other situations, the difficulty of discovering the true level of competitors' prices may itself indicate the need for a uniform pricing strategy. See *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975); *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 54-56 (1st Cir. 1964).

throughout the state (J.A. 91-93). At other times, such information was freely available from distributors (J.A. 86-87, 90). Moreover, at least two of Falls City's major competitors, Miller Brewing Company and Stroh Brewing Company, had uniform prices throughout the state of Kentucky (J.A. 91), and Stroh's uniform prices were lower than Falls City's uniform prices (J.A. 93). Other brewers whose prices varied throughout the state charged sometimes more and sometimes less than Falls City for the same product (J.A. 94). In Indiana, brewers were required by law to charge a uniform price to all wholesalers in the state. Ind. Code Ann. § 7.1-5-5-7 (Burns 1978). Given such market conditions, a demand for customer-by-customer negotiations would be pointless. Cf. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1046 (9th Cir. 1981) ("[m]arketwide price reductions are permissible when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market"). See also F. Rowe, *supra*, at 235-236.

In addition, given the possibilities of arbitrage implicit in a system of f.o.b. sales to wholesalers, individually negotiated prices in a local geographic market will often be an exercise in futility. If a seller charged one f.o.b. price to wholesaler X, and a relatively lower f.o.b. price to wholesaler Y in the same market in order to meet a competitive offer, the result over any sustained period might simply be that Y would purchase the product for both wholesalers.[9] Although arbitrage seems to have been inhibited by Kentucky alcoholic beverage law (Ky. Rev. Stat. § 243.180 (1981)), the likelihood that it will occur in other contexts strongly suggests the impracticality of any absolute rule against territorial pricing.

Finally, a requirement of individual price negotiations in order to meet competition would often present a seller with a choice between incurring needless burdens and

[9] The evidence in this case suggests that precisely that may have happened at one point in the cross-border retail market (J.A. 26).

expense, on the one hand, and foregoing price competition altogether. This dilemma is illustrated by *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966). Callaway Mills, a carpeting manufacturer, was charged with violating Section 2(a) of the Robinson-Patman Act when it adopted the industry-wide practice of granting volume discounts to retail stores. Its defense that it was only meeting competition, and so protected by Section 2(b), was rejected by the Commission on the ground that it "had adopted a 'formal pricing system' instead of meeting each individual competitive situation as it arose." *Id.* at 439. The court of appeals vacated the Commission's order, finding that, as a practical matter, adjustment of each individual price was impossible:

> [T]here is a difference in construction, design, patterns, colors, or materials between carpets selling at the same price level, presenting an infinite variety from which customers may choose. * * * When one multiplies the broad number of styles with the number of manufacturers (approximately fifty to sixty), the number of different types of carpeting is quite large. * * * To price each style of its carpeting with specific reference to all the different styles of every competitive line * * * would require the petitioners to engage in *exhaustive* cost studies on the multitude of carpets on the market *before they are actually sold and before any discounts are given.* Such a procedure would be burdensome, unreasonable, and practically unfeasible.

Id. at 442 (emphasis in original). See also *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956); H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 78 (1976). Similar difficulties would be faced by any seller of numerous products in a market where the number of competing sellers was large. The administrative costs of complying with a requirement of *ad hoc* pricing could also be prohibitive for small firms like Falls City, which competed

in 13 separate state markets, which priced beer differently according to a number of different packaging methods (Pet. App. 27a; see also *id.* at 63a), and which had numerous distributors and multiple competitors in each state. To impose unduly cumbersome and impractical procedures on a marginally profitable firm might make it impossible for it to respond to competition at all. Such a result would be at odds with the purpose of Section 2(b), which, as this Court has observed, embodies "'a flexible and pragmatic, not technical or doctrinaire, concept.'" *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 454, quoting *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963).[10]

B. The Use Of Territorial Pricing Is Consistent With This Court's Decision In *FTC* v. *A.E. Staley Manufacturing Co.*

The court of appeals' rejection of Falls City's meeting-competition defense (Pet. App. 9a-10a) relied heavily on this Court's statement in *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 753, that "§ 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. * * * The Act * * * places emphasis on individual competitive situations, rather than upon a general system of competition." Judge Swygert, in dissent, found "[t]he *Staley* holding * * * not at all apposite to the situation in this case" (Pet. App. 15a). A careful consideration of the holding in *Staley*, and a comparison of the competitive situations involved here and there, demonstrate that nothing in that

[10] The Department of Justice previously has announced its view that, in appropriate cases, uniform pricing policies should be permitted under Section 2(b). Department of Justice, *Report on the Robinson-Patman Act* 24-25, 99-100, 265 (1977). See also *Ludwig* v. *American Greetings Corp.*, 282 F.2d 917 (6th Cir. 1960); ABA Section of Antitrust Law, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Vol. 1, at 126-128 (1980); R. Posner, *The Robinson-Patman Act* 42-43 (1976); F. Rowe, *supra*, at 239-240.

opinion imposes an absolute barrier to the use of territorial pricing.

In *Staley* the price discrimination condemned by this Court was linked to a price-fixing agreement among sellers. *Staley* arose from an administrative complaint of the Federal Trade Commission charging violations of Section 2(a) of the Robinson-Patman Act in the use of a Chicago basing-point system for the sale of glucose. Staley, whose plant was located in Decatur, Illinois, sold glucose to all points at a delivered price which included the freight rate from Chicago. Purchasers relatively near to Decatur thus were charged an element of "phantom" freight, while Staley "absorbed" an element of freight in sales to buyers relatively near to Chicago. 324 U.S. at 749. The effect that the basing-point system had on competition was felt by Staley's customers, candy and syrup manufacturers. Because "a difference of a fraction of a cent in the sales price of the candy processed from the glucose could divert buyers from one candy manufacturer to another" (*id.* at 756), buyers located near Staley's Decatur plant were deprived of a considerable competitive benefit.

The reason Staley was willing to sacrifice the geographical advantage that it had in its local market appears clearly both from this Court's opinion and the background of the case. The FTC had proceeded not only against Staley, but also against six competing manufacturers of corn syrup, all of which adhered to the same basing-point system. See C. Edwards, *The Price Discrimination Law* 372-379 (1959). The Commission's attack on the system had two prongs: the first involved proceedings against the manufacturers individually for price discrimination; the second charged them jointly for price fixing. See *Corn Products Refining Co.*, 47 F.T.C. 587 (1950). The concerted action that resulted in the price-fixing charge had obvious implications for Staley's claim that it had adopted the basing-point system as a "good faith" response to competition. As the FTC stated

in its modified decision, *A.E. Staley Manufacturing Co.* v. *FTC*, 4 F.T.C. Stat. & Dec. 795, 805 (1943):

> If it were necessary for the Commission to prove bad faith, appropriate steps would be taken for the consideration of the entire background of the Chicago-base-plus-freight pricing system used by respondents and their competitors, including the final decree issued April 6, 1932, by the United States District Court for the Northern District of Illinois in *United States* v. *Corn Derivatives Institute, et al.*, Equity No. 11634 (in which the respondents herein were defendants and consented to the entry of such decree). This decree enjoined the defendants from maintaining or continuing a conspiracy in restraint of trade and commerce in violation of the Sherman Act, which included the agreed use of Chicago as an arbitrary freight basing point * * * for the purpose of enabling defendants to maintain oppressive and uniform net delivered prices * * *.

In sustaining the Commission's order, this Court made it clear that members of a cartel could not defend against charges of price discrimination merely by showing that they charged the same prices as their competitors. "The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system." *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 756.[11]

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[11] Cf. F. Rowe, *supra*, at 221-222; *Callaway Mills Co.*, 64 F.T.C. 732, 750 n.3 (1964) (Commissioner Elman, dissenting). This Court has recognized in other contexts that agreements to adopt a basing-point system to equalize prices among competitors will disqualify a seller from claiming the Section 2(b) defense. *FTC* v. *Cement Institute*, 333 U.S. 683, 722-724 (1948). Cf. *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957) (sustaining an FTC order against matching delivered prices by use of a zone system). The frequent con-

In sharp contrast to the situation in *Staley*, this is a case in which the district court explicitly found "no evidence that [Falls City] set its prices * * * pursuant to an agreement with any other brewer of beer," and rejected Vanco's claim that Falls City had violated the Sherman Act (Pet. App. 45a, 46a). Vanco did not appeal that determination. Moreover, the price that Falls City quoted its customers was an f.o.b. factory price, not a delivered price which incorporated or deducted freight charges based on a distant basing point. An f.o.b. factory approach avoids the kind of injury to competition that

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nection that exists between basing-point pricing systems and price fixing prompted a proposal in the original House version of the Robinson-Patman Act that all prices be computed f.o.b. factory. See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 11-14 (1936). Though the proposal was ultimately withdrawn (see 80 Cong. Rec. 8102, 8140, 8224 (1936)), this Court has recognized that the aim of the withdrawal was only to avoid making "all basing point systems illegal per se." *Corn Products Co.* v. *FTC*, 324 U.S. 726, 737 (1945).

None of the statements in dictum in *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958), require a contrary reading of *Staley*. The Court did say in *Standard Oil* (*id.* at 401) that "[b]oth parties acknowledge that discrimination pursuant to a price system would preclude a finding of 'good faith.' *Comm'n* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683 (1948); *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419 (1957)". However, the citation of *Staley*, *Cement Institute*, and *National Lead* shows that the Court did not mean to imply that only individually negotiated prices satisfy the demands of Section 2(b). On the contrary, the Court made clear that it was referring only to meeting *unlawful* price systems like those involved in the earlier cases. 355 U.S. at 399-400 n.4. See also the decision of the court of appeals in *Standard Oil*, 233 F.2d 649, 653-654 (7th Cir. 1956). Indeed, the holding in *Standard Oil* is that a seller need not negotiate prices anew each time a competitor makes an individual offer. 355 U.S. at 402-403 & n.8. Although *Standard Oil* considered the propriety of continuing to offer a lower price to a limited number of buyers over a prolonged period of time, the decision that a lower price need not always be precisely tailored to fit a multitude of competing offers applies equally to offers made to a larger group of customers at a given point in time.

this Court found objectionable in *Staley*—depriving customers in the seller's local territory of the advantage of lower freight costs.

The charging of different f.o.b. prices to wholesalers in adjacent states does not in itself inflict injury on secondary-line purchasers if those purchasers, unlike the candy and syrup manufacturers in *Staley*, do not compete with one another. In this case, Kentucky and Indiana law prevented such competition. The effects of the differing prices were felt only along a narrow strip at the state border, where consumers were able practically (though, in the case of packaged beer, not legally) to choose between Indiana and Kentucky retailers. In short, the only real similarity between this case and *Staley* is that sellers in both cases adopted pricing practices that did not depend on individually negotiated prices. Nothing in the Act forbids such pricing practices per se. The question is, as this Court has recognized, a factual one concerning what a "reasonable and prudent person," acting without collusion, would do to meet the forces of competition. *Great A&P Tea Co.* v. *FTC*, *supra*, 440 U.S. at 82, quoting *FTC* v. *A.E. Staley Manufacturing Co.*, 324 U.S. at 760.

II. FALLS CITY WAS MEETING COMPETITION "IN GOOD FAITH" AS REQUIRED BY SECTION 2(b) WHEN IT ADOPTED TERRITORIAL PRICES

Vanco now appears to accept the principle, rejected by the court of appeals, that *Staley* does not foreclose a seller who adopts territorial pricing from claiming the benefits of the Section 2(b) meeting-competition defense (Br. in Opp. 21). It nonetheless contends that Falls City is disqualified from establishing the defense because "adoption of a competitor's discriminatory price system is not, by itself, sufficient to show good faith, and * * * Falls City did not in fact show good faith" (*id.* at 19). That contention rests on a misunderstanding of the good faith requirement in Section 2(b).

A. A Seller Which Meets The Equally Low Price Of A Competitor Is Presumed To Have Acted In Good Faith

An examination of the cases interpreting the "good faith" requirement in Section 2(b) demonstrates that it is not intended to add to a defendant's burden an "additional element beyond the meeting of a competitor's equally low price, but rather mitigates the literal text of Section 2(b)." F. Rowe, *supra*, at 248. Its essential role is to excuse seller behavior which, though undertaken in response to a perceived competitive threat, would nonetheless run afoul of the literal demands of the meeting-competition proviso because, for example, the perceived threat was not real, because the seller—acting on misinformation—actually undersold his competitor, or because the price met was—unbeknownst to the seller—illegal. In such cases, the good faith element requires "a flexible and pragmatic, not technical or doctrinaire, [approach]. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963).

For example, in *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 453-455, this Court held that inter-seller verification of prices was not necessary to establishment of the defense. The reason was that, even if a buyer misrepresented to his seller the existence of competing offers, the seller—having made a commercially reasonable attempt to substantiate the claim—would be entitled to assert the good faith defense if he cut his price, notwithstanding the fact that he had not "[met] an equally low price of a competitor" (15 U.S.C. 13(b)). Cf. *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 759-760. Similarly, in *Great A&P Tea Co.* v. *FTC*, *supra*, the Court held that a seller of dairy products which undercut its competitor by an annualized amount of $83,000 would be entitled to the protection of Section 2(b). "Since good faith, rather than absolute

certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition." 440 U.S. at 83. Implicit in the *A&P* holding that a seller may act in ignorance of his competitor's true price is the additional principle that a seller may at times claim the benefit of Section 2(b) even though the price he met was itself unlawful. For example, if the seller's competitor offered a discount later proven not to be cost-justified, the seller could still meet the discount in good faith because he would have no way of substantiating its amount, let alone whether it reflected actual cost savings to his competitor.[12]

That is not to say that a seller may act with impunity in meeting a price which he knows, or should know, is unlawful. Cf. *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 753. But the element of good faith in Section 2(b) otherwise imposes no requirement on sellers to prove the grounds for their belief in the legality of their competitor's prices. The burden of coming forward with such a showing is on one objecting to discrimination. *Standard Oil Co.* v. *Brown*, 238 F.2d 54, 58 (5th Cir. 1976); F. Rowe, *supra*, at 227-229. And a seller may properly respond to such a showing by demonstrating that he acted only as a prudent businessman fairly responding to a situation of competitive necessity.

B. Falls City's "Lower Price" In Kentucky Was A Good Faith Response To Competition

The district court and the court of appeals concluded that Falls City was not entitled to the protection of

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[12] See *Report of the Attorney General's National Committee to Study the Antitrust Laws* 182 (1955); *Balian Ice Cream Co.* v. *Arden Farms Co.*, *supra*, 231 F.2d at 366; *Standard Oil Co.* v. *Brown*, 238 F.2d 54, 58 (5th Cir. 1956); ABA Section of Antitrust Law, Monograph No. 4, *The Robinson-Patman Act: Policy and Law*, Vol. 1, 128-130 (1980); F. Rowe, *supra*, at 220-230. Cf. Department of Justice, *Report on the Robinson-Patman Act* 282 (1977).

Section 2(b) because its price differential resulted from price increases in Indiana, not price decreases in Kentucky. Thus, Falls City was not responding to a competitive threat but merely "taking advantage of its competitors' policies of charging higher prices in Indiana" (Pet. App. 9a-10a; 37a-38a, 49a). Vanco also argues that Falls City has "not met its burden to prove the good faith defense" (Br. in Opp. 24) because it "never established a non-discriminatory price from which it lowered its Kentucky price" (*id.* at 23).

1. Section 2(b) does not require a seller *to lower his price* in order to meet competition. What it says, on the contrary, is that a seller may show that *"his lower price* * * * was made in good faith to meet an equally low price of a competitor * * *." 15 U.S.C. 13(b). A seller is required to justify a price difference; he is not required to show that the difference resulted from any particular process of addition or subtraction. In a period of rapid inflation, the only effect of vigorous price competition in a particular market may be that price increases there lag behind increases elsewhere. Because price competition may take the form of moderate increases, rather than outright decreases, the court of appeals' interpretation would stifle the kind of competition most realistically available and undermine the utility of the Section 2(b) defense. See Pet. App. 16a. A contrary view, particularly in an inflationary environment, would induce artificial and costly behavior such as initial price increases to all customers followed shortly by selective reductions.

Contrary to the assumption made by the court of appeals, nothing in *FTC* v. *A.E. Staley Manufacturing Co.*, *supra*, holds that the defense is limited to price reductions. *Staley* does say (324 U.S. at 754) that

> [t]his test presupposes that the person charged with violating the Act would, by his normal, non-discriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price.

But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). The Court did not mean to preclude a seller, whose "normal, non-discriminatory pricing methods" dictated a price increase, from maintaining a lower price to some customers "in order to meet the competitor's equally low price." The point the Court was making was that Staley had not priced competitively in good faith because, rather than making its own pricing decisions in an attempt to meet competition, it had charged nearby buyers "artificially high prices" (324 U.S. at 756) pursuant to an agreement with its competitors to maintain prices above a competitive level.

Thus, so long as Falls City is able to demonstrate that its price disparity resulted from a reasonable and prudent commercial reaction to competitive conditions, it has complied with the demands of Section 2(b). It need not make some further unspecified showing of "good faith" simply because it maintained a lower price in Kentucky while raising its price in Indiana.

2. A consideration of the facts in this case shows that Falls City's price difference was a proper response to competition. It is undisputed that Falls City generally followed the prices of larger brewers who sold beer to Kentucky and Indiana distributors. For example, price schedules submitted to the Kentucky Department of Alcoholic Beverage Control in 1972 showed that Stroh's beer was sold throughout Kentucky at a lower price than Falls City. Pabst, Falls City's other principal competitor, sold beer at prices that were in some cases above, and in some cases below, the price of Falls City beer (J.A. 86-87, 94, 194). A comparison of prices charged by competing brewers to wholesalers in Evansville, Indiana and Henderson, Kentucky in December, 1976 shows that Kentucky prices were in all cases lower than Indiana prices for the same product (J.A. 182-185). There is no allegation that Falls City's Kentucky prices were below the lowest price charged by its competitors in any

area of Kentucky. Rather, Falls City responded to its competitors' lower Kentucky prices by selecting an f.o.b. price within the range of those prices and charging that price to all its Kentucky customers.

One method of eliminating the discrimination of which Vanco complains would have been for Falls City to raise its Kentucky price in lock-step with price increases in Indiana. Had Falls City done so, however, it would have lost Kentucky customers because of the lower prices offered by its competitors (see J.A. 90)—precisely the result Section 2(b) was designed to avoid. *Standard Oil Co.* v. *FTC*, *supra*, 340 U.S. at 250. Nor could Falls City have solved Vanco's problem by only charging its higher Indiana price to its distributor (Dawson Springs) in Henderson County, Kentucky. Not only did brewers competing with Falls City charge lower prices in Henderson County than they did in Indiana (see Pet. App. 62a-63a), but by raising the price to Dawson Springs Falls City would only have exposed itself to another Robinson-Patman claim by that distributor. The direct competition between Dawson Springs and other Kentucky wholesalers may well have been greater than the indirect competition between Dawson Springs and Vanco, on which the district court based its finding of competitive injury.[13]

A second method of eliminating the discrimination of which Vanco complains might have been to charge Falls City's lower Kentucky price to Vanco. But Indiana law

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[13] See, *e.g.*, J.A. 52-53 (Dawson Springs tried to stay competitive with wholesalers in Paducah and Hopkinsville, Kentucky). Moreover, an attempt by Falls City to raise its price to Dawson Springs would have done little to alleviate the problem of which Vanco complains. It is undisputed that the reason Falls City's f.o.b. price was lower in Kentucky was that its competitors charged lower prices to Kentucky distributors than to those in Indiana (see Pet. App. 62a-64a; J.A. 91-92). Thus, to the extent consumer brand loyalties were not strong, Vanco still would have lost business because Indiana consumers would have continued to travel to Kentucky to buy brands other than Falls City at a cheaper price. See *Standard Oil Co.* v. *FTC*, *supra*, 340 U.S. at 250.

prohibited Falls City from doing so without simultaneously lowering its price to all other Indiana wholesalers. Ind. Code Ann. § 7.1-5-5-7 (Burns 1978).[14] While no state law prohibited Falls City from lowering its statewide Indiana f.o.b. price to equal its Kentucky f.o.b. price, Falls City had decided that such a strategy would be contrary to its financial interests. As its president testified (J.A. 90-91), Falls City had concluded that the increased sales volume generated by a lower price would have been more than offset by profits sacrified on individual sales. That commercial decision is one which is protected by Section 2(b). *Standard Oil Co.* v. *FTC*, *supra*, 340 U.S. at 250.

C. There Was No Proof Of An Unlawful Pricing Agreement That Would Call Into Question Falls City's Good Faith

Vanco also has suggested that Falls City was not meeting competition in good faith because it was participating in unlawful oligopoly pricing (Reply to Amicus Br. 5-10). There is no merit to this claim.

1. The district court dismissed Vanco's claim that Falls City had violated Section 1 of the Sherman Act, finding "no evidence that [Falls City] set its prices * * * pursuant to an agreement with any other brewer of beer" (Pet. App. 45a). Vanco did not appeal the dismissal of its Sherman Act claim, nor did its brief in the court of appeals assert that the meeting-competition defense was unavailable because there had been collusion among Falls City and its competitors. Consequently, Vanco's belated attempt to litigate that factual issue in this Court should be rejected.

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[14] Even in the absence of that state law, a lower price offered to Vanco and not to other Indiana wholesalers would have subjected Falls City to Robinson-Patman liability to disfavored Indiana wholesalers competing with Vanco. Since Falls City's competitors did not charge less in Evansville than elsewhere in Indiana, Falls City would not have had a meeting-competition defense had it charged Vanco less than it charged other Indiana distributors.

Moreover, as the foregoing discussion of "good faith" demonstrates, Vanco's argument merely attempts to shift to Falls City a burden which Vanco failed to shoulder at trial. Except perhaps in those cases where the unlawfulness of competitors' prices would be obvious to any reasonably prudent seller, the burden of coming forward with evidence of illegality is on the party challenging the seller's right to meet competition. That principle is implicit in this Court's holding in *Great A&P Tea Co.* v. *FTC*, *supra*, that a seller may claim the defense even if he does not know with certainty what his competitors' prices are. Other courts and commentators have recognized the point even more explicitly.[15] Vanco was unable to show to the satisfaction of either of the courts below that brewers competing with Falls City were acting unlawfully in charging lower prices in Kentucky than they did in Indiana. Under those circumstances, Falls City was under no obligation to demonstrate that the prices it was constrained to meet were lawful.[16]

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[15] See, *e.g.*, *Standard Oil Co.* v. *Brown*, *supra*, 238 F.2d at 58 & n.7; *Indian Ice Cream Co.* v. *Arden Farms Co.*, *supra*, 231 F.2d at 366; F. Rowe, *supra*, at 227-230; *Report of the Attorney General's National Committee To Study the Antitrust Laws*, *supra*, at 182; *E. Edelmann & Co.*, 51 F.T.C. 978, 997 (1955).

[16] The only evidence Vanco cites in support of its collusion theory are the relative market concentration in Evansville and the state of Indiana, and the rise in prices in Indiana and Kentucky from 1972 through 1977. In 1978, the Bureau of Economics of the Federal Trade Commission completed a study of the brewing industry nationwide, which concluded that "the weight of the evidence supports the view that the industry has actually become more competitive * * *." Bureau of Economics, Federal Trade Commission, *The Brewing Industry* (Staff Report) 1 (Dec. 1978). In support of this conclusion, the Report cites the following factors: since 1950, the brewing industry has been less profitable than all manufacturing industries; the relatively high profits of the leading firms reflect more efficient production, distribution, and marketing, rather than noncompetitive behavior; trends in national concentration mask the fact that regional concentration has always been high; and the real price of beer relative to inflation has actually fallen over time. *Id.* at

2. Alternatively, Vanco appears to argue that the meeting-competition defense should not be available in a concentrated market (Reply to Amicus Br. 5-6), and that because persistent *economic* price discrimination may be evidence of collusion, the meeting-competition defense is not available in cases of persistent price differences (*id.* at 5-10). Both of these arguments are devoid of merit.

Even accepting *arguendo* Vanco's contention that the relevant brewers' market is "highly concentrated," that factor is irrelevant in this case. There is nothing in Section 2(b) that makes the meeting-competition defense unavailable to a seller in a concentrated market.[17] While high concentration may facilitate collusion, there is no

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1-3. See *also id.* at 19-21, 124, 129-135. Although the trial court sustained an objection to admitting the *Report* into evidence, it was considered by the court along with post-trial briefs (Tr. 911), and lends additional support to the finding of an absence of collusion.

There are numerous possible explanations for the persistence of the Kentucky/Indiana price differential, given the restrictive state laws applicable to beer distribution. One possibility is that the Indiana law requiring brewers to charge uniform prices to all Indiana distributors itself impeded price competition in the state. The absence of such a law in Kentucky could be expected to result in more vigorous competition and lower prices. Still another possible factor is that brewers' costs of doing business may be higher in Indiana than in Kentucky. Brewers, distributors, and retailers are subject to various state regulations governing such matters as advertising (see Ind. Code Ann. § 7.1-2-3-16; *Indiana Alcoholic Beverage Comm'n* v. *McShane*, 354 N.E. 2d 259 (Ind. Ct. App. 1976); Plaintiff's Exh. 216, p. 11; Ky. Rev. Stat. § 244.130, § 244.140 (1981)); credit (see Ind. Code Ann. § 7.1-5-10-12 (Burns 1978); Ind. Admin. Code 1-21-1 (1979); Ky. Rev. Stat. § 244.040 (1981)); container deposits (see *ibid.*); excise tax concessions (Ky. Rev. Stat. § 243.720(3) (1981)); oversight of distribution contracts (see Ind. Code Ann. §§ 7.1-3-3-17, 7.1-5-5-9 (Burns 1978)); and even local options concerning whether beer should be sold at all (see Ky. Stat. ch. 242 (1981); Tr. 534-535)). State liquor laws thus may have significant and persistent effects on the cost of doing business.

[17] Indeed, if it were not available, the seller who was unable to meet competition might be driven out of the market, further increasing concentration.

legal or economic support for Vanco's theory that collusion may be inferred solely from the existence of market concentration.

Vanco's contention that persistent price discrimination renders unavailable the meeting-competition defense rests on its confusion of *economic* price discrimination and "price discrimination" as that term is used in the Robinson-Patman Act. *Economic* price discrimination consists in selling a product to different customers at prices that bear different ratios to the marginal costs of sales to those customers, *e.g.*, charging the same price to two customers despite the fact that the seller incurs higher costs to serve one than the other.[18] The primary focus in determining the existence of economic discrimination, therefore, is on the seller's marginal *costs* of serving different customers. By contrast, price discrimination in the *legal* sense, *i.e.*, under the Robinson-Patman Act, consists in a seller's charging competing customers different prices. The initial focus, thus, is on the seller's *prices*. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

While persistent economic price discrimination may constitute some evidence of collusion,[19] no economic price discrimination was proven in this case; indeed no evidence was introduced to show the level of marginal costs. This case involved allegations of price differences prohibited by the Robinson-Patman Act. Moreover, even if economic price discrimination had been proven, such discrimination is only one of many factors that may be relevant in detecting collusion. It is not conclusive alone

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[18] R. Posner, *Antitrust Law* 62 n.35 (1976); L. Sullivan, *Antitrust* 681-682 (1977).

[19] Absent collusion, a seller who persistently denies a lower price to a customer he can serve more cheaply will lose that customer to competitors. The risk of losing the customer to competitors, however, is eliminated by collusion.

and could not draw into question the district court's finding that there was no price conspiracy here.[20]

In short, examination of Vanco's arguments reveals that they would so limit the meeting-competition defense as to leave Falls City and other similarly situated firms with no rational competitive pricing option that would not carry the risk of Robinson-Patman liability. Such a result is inconsistent with the language and purpose of the Section 2(b) defense and is totally at odds with the broader purposes of the federal antitrust laws.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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[20] There is nothing in Section 2(b) that precludes application of the meeting-competition defense in a case involving a "persistent" rather than "sporadic" price differential. As long as Falls City's competitors kept their Kentucky prices lower than their Indiana prices, Falls City was legally and economically justified in doing likewise.

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Supplemental Respondent's Brief

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF

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MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Respondent Vanco Beverage, Inc. ("Vanco") respectfully moves this Court for leave to file RESPONDENT'S SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT, instanter.

At oral argument held October 13, 1982 some of the Justices indicated a concern over the effect of the definition of the proper geographic market of an unenforced Indiana law which prohibited consumers from importing more than one quart of beer. This issue was not raised in Falls City's Petition for Certiorari and was not briefed by the parties or by the Amicus. Because this issue was first raised by this Court at oral arguments, Vanco has not had an opportunity adequately to present its position on this issue to this Court nor to inform the Court that Falls City in its January 18, 1980 letter to the district court stated, in pertinent part, that:

> The parties also agree that Vanco's claim of indirect injury based on alleged competitive effects at the retail

level, are not controlled by the 21st Amendment or the state laws of Indiana and Kentucky.

Vanco requests that this Court allow it such an opportunity by granting leave to file the instant supplemental brief after oral argument.

Respectfully submitted,

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December 3, 1982

No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

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CHAS. P. YOUNG CHICAGO, INC.

No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

I. INTRODUCTION

Oral argument in this case was heard on October 13, 1982. At that oral argument, some of the Justices asked whether it was open to the Court to address the question, not raised in Falls City's Petition, of whether the Evansville-Henderson area is one or two geographic markets. This concern was based, apparently, on the fact that an unenforced Indiana law prohibits a consumer from importing more than one quart of beer into Indiana. The district court, affirmed by the Seventh Circuit, held that the Evansville-Henderson area was a single market for retail beer sales. That finding was not challenged by Falls City in this Court.

At oral argument in this Court, counsel for Falls City stated, in response to a question of whether the existence of one or two geographic markets was a question of fact or law,

"I think that is somewhat of a mixed question." Asked whether there were one or two markets as a matter of law, counsel for Falls City responded, "Well, I think there are many factual components in that . . ." and "I'm not asking this Court to delve into the record to second-guess that determination by the lower courts" (Transcript of Oral Argument, at 5-6).

In addition to the fact that Falls City has thus abandoned its argument that there were two markets, Falls City has never relied on the Indiana nonimportation law with regard to the definition of the geographic market. The impact of that law on this case was never raised or briefed by either of the parties.

This Brief is filed pursuant to Rule 35.6, upon leave of this Court, to address for the first time the question of the effect of the Indiana nonimportation law on the definition of the proper geographic market.

II. FALLS CITY HAS WAIVED RELIANCE ON THE INDIANA NONIMPORTATION LAW AND HAS AGREED THAT THE LAWS OF INDIANA AND KENTUCKY DO NOT CONTROL THIS CASE

The importation into Indiana of quantities of beer purchased in Kentucky was technically illegal because of an Indiana statute which was described in Vanco's Brief in Chief as follows:

> By the laws of both Indiana and Kentucky, Indiana retailers were required to purchase beer from Indiana distributors, and Kentucky retailers from Kentucky distributors. However, beer consumers were free to purchase beer from the retailers of their choice.[7]

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[7] Indiana law prohibits consumers from importing more than one quart of an alcoholic beverage without a permit. Ind. Code §§ 7.1-5-4-1, 7.1-5-11-1 (1976). This law was generally not enforced. On one occasion, when consumer importation of beer became so notorious that it was reported in the newspapers, several consumers were arrested by the Indiana police.

> These arrests generated enormous controversy and no further arrests were made (Tr. 122-23, 135-36; PX 57; J.A. 134-35). Vanco's Brief in Chief, filed July 28, 1982, at 6.

That quotation is the only mention of the nonimportation law made by either of the parties to this suit in any of their briefs filed in this Court or in either of the courts below. Falls City has never disputed that the nonimportation law was hardly ever enforced and was not enforced at all after July of 1974, or that beer consumers were free to purchase beer from the retailers of their choice.[1] Furthermore, it is not disputed that it was not, and is not, illegal for Kentucky retailers to sell beer to Indiana residents and that Kentucky retailers directed advertising to Indiana residents.

In fact, Falls City has never relied on the Indiana nonimportation law as in any way creating a barrier dividing the Evansville-Henderson retail market. Thus, paragraph 2 of Falls City's Third Affirmative Defense states merely that "defendant's actions were in conformity" with the provisions of the Indiana alcoholic beverage code. Falls City never briefed that purported defense until specifically directed by the district court either to file a brief relating to this defense or to withdraw it.[2] At that point Falls City filed a brief in which it

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[1] The Government, as Amicus, has conceded that Indiana consumers traveled to Kentucky to purchase cheaper beer. Amicus Brief in Support of Petition for a Writ of Certiorari, at 6 ("Vanco . . . was indirectly injured because consumers served by its retailer customers crossed the border to buy beer at lower retail prices in Kentucky (see Pet. App. 6a-7a)"); Amicus Brief in Support of Reversal, at 5 ("As a matter of fact, however, some competition occurred along the state border, because Indiana consumers crossed the state line into Kentucky to purchase cheaper beer").

[2] The district court's order, dated November 28, 1979, was issued after the trial and after Falls City had filed its proposed findings of fact and conclusions of law and had replied to Vanco's proposed findings of fact and conclusions of law. The district court order stated that: "The parties are ORDERED to advise the Court whether or not the Third Affirmative Defense has been withdrawn, and if not

(footnote continued on next page)

never even mentioned the nonimportation law. Instead, Falls City attempted to rely on Indiana's single price law as somehow exonerating its price discrimination.

Most significantly, by letter dated January 18, 1980, lead counsel for Falls City wrote Judge Holder of the district court a letter, the first paragraph of which is as follows:

> Dear Judge Holder:
>
> We have received the Response of Vanco Beverage, Inc. to Falls City's Brief in Support of its Amended Third Affirmative Defense to Count II of Plaintiff's Amended Complaint. Although Falls City is entitled to file a reply brief, we feel nothing more needs to be said about the 21st Amendment issue in this case. The parties are in agreement that state laws given primacy by t..e 21st Amendment, preclude direct competition between Vanco and the Henderson, Kentucky distributor, Dawson Springs (Vanco Response, p. 6). *The parties also agree that Vanco's claim of indirect injury based on alleged competitive effects at the retail level, are not controlled by the 21st Amendment or the state laws of Indiana and Kentucky.* Instead, Vanco's claims of indirect injury depend upon issues of market definition, competitive impact, business injury to Vanco and computation of Robinson-Patman Act damages that have all been abundantly briefed. (emphasis supplied) (a copy of this letter, without the attachment thereto, is set forth in the Appendix to this Supplemental Brief).

The above statement by Falls City's lead counsel, who argued for Falls City in this Court, constitutes more than a waiver of the Indiana nonimportation law as creating two markets separating Evansville and Henderson. It constitutes forthright agreement that the "issue of market definition" in this

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(footnote continued from preceding page)

withdrawn, to brief the issue and submit findings of fact and conclusions of law in accordance with" a set schedule.

case does not depend upon any or all the state laws of Indiana and Kentucky.

As Vanco established in its Brief in Chief, the only state law on which Falls City even attempted to rely, Indiana's single-price law, had no impact on Falls City's pricing decisions. Falls City, as a matter of policy, charged a single price statewide in each and every one of the thirteen states in which it sold beer, regardless of whether a uniform price was required by state law (Vanco's Brief in Chief, at 23-24). The Indiana uniform price law could not have caused Falls City to price higher in Indiana than elsewhere. This is especially obvious since Falls City's prices in West Virginia, which had a similar one-price law, were lower than its Indiana prices (Vanco's Brief in Chief, at 16 n. 23).

Furthermore, there is evidence that in years prior to the period at issue here the price level in Indiana was the *same or lower* than in neighboring states, even though the single-price law was then in effect. The Amicus introduced evidence in *United States* v. *Pabst Brewing Company,* 384 U.S. 546 (1966), and filed that evidence in this Court, which showed that the prices charged by Pabst (which was identified by Falls City as one of its two major competitors) and by Blatz, *were the same or lower in Indiana than in Kentucky.*[3] Since the Indiana nondiscrimination law had been the law since at least 1941 (Acts 1941, ch. 237), and many years later there was no price discrimination against Indiana wholesalers, that law clearly cannot be responsible for the substantial (10% to 29%) price discrimination that later developed and was sustained for at least eight years.

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[3] For a fuller description of the evidence in the *Pabst* case, see Vanco's Supplemental Brief, filed on October 6, 1982, at 6. Furthermore, the Transcript of Record in the *Pabst* case, filed in this Court by the United States and by Pabst, shows that Pabst's prices on its principal brand were the same in Indiana, Kentucky, Ohio, Michigan and a number of other States (Transcript of Record, at 253-259).

Furthermore, the Indiana one-price law applied to all alcoholic beverages, not just beer. However, the evidence shows that liquor prices were lower in Indiana than in Kentucky. As was mentioned in oral argument, this difference in the liquor prices is evident from the testimony of Richard L. Powell, Manager of the House of Beverages.[4] The House of Beverages is located in the Old Orchard Shopping Center in Henderson, Kentucky, and had, prior to the opening of the Cut Rate Liquor store in Evansville, been the largest liquor store in the Evansville-Henderson area. Mr. Powell testified as follows (on cross-examination):

> Q. Uh, it is true sir that at the present time liquor prices in Indiana are cheaper than liquor prices in Kentucky?
>
> A. From what I can hear and they have advertised at Cut Rate cheaper liquor prices yes.
>
> Q. Is this a concern to you?
>
> A. Uh, yes in a way cause we're definitely loosing business to Cut Rate in Evansville. . I've had customers come in and say they'll go over there and buy their alcoholic beverages.
>
> (PX 215, Powell dep., at 22-23.)

Since the Indiana one price law, which applies to the sale of all alcoholic beverages,[5] did not cause liquor prices to be higher in Indiana than in Kentucky, there is no reason to suppose it could have caused Indiana beer prices to be higher.

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[4] Mr. Powell's deposition was noticed by the defendant, Falls City. It was offered in evidence at trial by the plaintiff, Vanco, and admitted as PX 215.

[5] Ind. Code 7.1-5-5-7 states that: "It is unlawful for a permittee in a sale or contract to sell alcoholic beverages to discriminate between purchasers by granting a price, discount, allowance, or service charge which is not available to all purchasers at the same time. . . ."

Thus, the only Indiana statute Falls City relied upon simply does not support its case. As has been and will be demonstrated in the ensuing section of this brief, the Indiana nonimportation law also does not support Falls City. In any event, Falls City conceded that neither that law nor any of the other laws of Indiana or Kentucky were pertinent to the issues in this case. Falls City not only did not argue on the basis of the nonimportation law to the district court, but it also never argued or briefed that law on appeal. The nonimportation law was not mentioned in the questions Falls City asked this Court to review. Thus, reliance on the Indiana nonimportation law has been waived by Falls City. As this Court has repeatedly recognized, absent exceptional circumstances, questions not raised at the trial or appellate levels should not be addressed by this Court. *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-63 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557-58 n.2 (1957).

Here there are no exceptional circumstances which would justify consideration by this Court of issues as to which the record has not been developed and which the trial and appellate courts did not have the opportunity to consider and resolve. Nor was there any "plain error" in the decisions by the trial and appellate courts which would justify departure from Rule 21.1(a) of this Court, which provides that "only the questions set forth in the petition" for a writ of certiorari "or fairly included therein will be considered by this Court." To the contrary, as the discussion below establishes, to the extent the Indiana nonimportation law is relevant, it supports Vanco's position rather than Falls City's.

It is not surprising that Falls City does not and did not rely on the nonimportation law in regard to the question of the relevant geographic market. As Falls City's own contemporaneous internal reports show, Falls City was well aware that "Part of [the] decrease [in Vanco's volume] is due

to the lower prices in the Kentucky markets" (PX 12).[6] Falls City clearly recognized the existence of the single geographic market found by the district court despite the Indiana nonimportation law. That recognition accords with economic reality and with established law, which recognizes that state political boundaries are no hindrance to consumers purchasing beer in one state and transporting that beer for consumption into another state, regardless of state laws which declare such transportation illegal. This reality was recognized, in *McCormack* v. *Theo. Hamm Brewing Co.*, 284 F. Supp. 158 (D. Minn. 1968), where Judge Lord (now Chief Judge) denied Hamm's motion for summary judgment on the plaintiff's Robinson-Patman Act claim. The claim, which was almost identical to the one in this case, was based on discrimination against the plaintiff, Hamm's Duluth, Minnesota distributor, in favor of Hamm's contiguous Superior, Wisconsin distributor.

Judge Lord rejected the defendant's contention that:

> . . . state laws which prohibit distributors from selling to the same set of retailers, but which do not prohibit those retailers from competing in the same market, effectively prevent the distributors from being competitors within the meaning of the Robinson-Patman Act.
>
> * * * *
>
> This Court feels that it should not remain blind to the fact that a distributor's success depends in large part upon the success of the retailers with which it deals. In this case a Superior distributor which was the beneficiary of an unfair price discrimination could unfairly compete by passing on this price advantage to his retailers. The Superior retailers would then be able to attract more customers and prosper at the expense of the Duluth retailers, and consequently, at the expense of the Duluth distributor. In this way the plaintiff, the Duluth distributor, if not granted price terms com-

[6] See quotations from and discussions of other Falls City internal documents in Vanco's Brief in Chief, at 8.

> parable to the terms afforded the Superior distributor might suffer competitive disadvantage. For this reason summary judgment is denied the defendant upon all Robinson-Patman Act claims involving alleged price discrimination between the plaintiff and the Superior, Wisconsin distributor. (284 F.Supp., at 163.)

The applicable state law in the *Hamm's* case prohibited the importation into Minnesota of untaxed beer (Minnesota Statutes 1981 §340.601, 1976 Amendment) and, according to this opinion, this law was not relied on by Hamm.

III. FALLS CITY CAUSED THE VIOLATION OF THE INDIANA NONIMPORTATION LAW

Before turning to the legal consequences of the fact that much of the competition that resulted in injury to Vanco was the result of consumers transporting beer from Kentucky into Indiana (in excess of one quart per person), it is helpful to reiterate a number of established facts. There is, of course, no suggestion that Vanco ever violated the nonimportation law, or that Vanco's retailers violated it. Vanco's retailers and Vanco were, in fact, victims of the violation of the Indiana nonimportation law by Indiana consumers. Those Indiana consumers were induced to transport beer by Falls City's egregious price discrimination and by the active solicitation of the custom of Indiana residents by the Kentucky retailers who were the beneficiaries of that discrimination. Since it was well known that the law was not enforced, those consumers were only in technical violation of the law when they brought more than one quart of beer per person into Indiana.

Similarly, there is no dispute that the nonimportation law was generally not enforced. On one occasion, when consumer importation of beer became so notorious that it was reported in the newspapers, several consumers were arrested by the Indiana excise tax police. These arrests generated enormous controversy and no further arrests were made.[7] In fact, the evidence in the record is that after July of 1974 no arrests

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[7] Tr. 22-23, 135-36, PX 57, J.A. 134-35. A newspaper article entitled, "Beer Price 'War' Building Up Again", by L. D. Seits, an

(footnote continued on next page)

whatsoever were made in the Evansville area for transporting beer from Kentucky into Indiana.

Furthermore, as Vanco amply established at trial and as was acknowledged by the Amicus (Amicus Brief in Support of Petition for a Writ of Certiorari, at 6; Amicus Brief in Support of Reversal, at 5, 8-9, 20), the Indiana and Kentucky retailers were in actual competition with each other. The Indiana retailers lost volume to the lower-priced Kentucky retailers, some of whom advertised those lower prices in the Indiana mass media.[8]

(footnote continued from preceding page)

Evansville Press staff reporter, who testified in Vanco's case in chief, stated, in pertinent part, that:

* * *

> Prosecutor William Brune, who has questioned the intervention of Indiana excise police in the beer price war, said yesterday one of the six men arrested July 27 had said three quarts of gin confiscated in his arrest and dumped by court order was actually bought in Indiana.
>
> * * *
>
> The question of the legality came amid signs that Henderson retailers were getting increased business from Evansville beer drinkers. One retailer on U.S. 41 north of Henderson but south of the Ohio River said beer sales had increased noticeably since the publicity surrounding the arrests, indicating that some Hoosiers had been unaware of the price gap until then.
>
> The disparity in prices amounts to more than $1 a case on some beers.
>
> Major Pomolese said last week the excise police have halted surveillance such as that which brought the six arrests on July 27 until the force receives word from Brune, who has said he is investigating the matter.

[8] See Vanco's Brief in Chief, at 7-11, for a fuller description of this competition.

Finally, not all of the competition that injured Vanco was the result of possibly illegal transportation. Competition for on-premises consumption in taverns, restaurants and the like involved no illegality. Vanco demonstrated a very substantial and regular flow of people across the border in both directions to shop and work. This flow included tens of thousands of factory workers who lived in one state and worked in the other. Indiana residents working in Kentucky could choose to go down the street or to stop at The Strip for an after-work beer, and Kentucky residents working in Indiana could cross back into Kentucky before stopping for a beer. For such on-premise trade, Indiana retailers were in perfectly legal competition with Kentucky retailers. The proliferation of bars along The Strip, located in Kentucky just south of the Indiana border, testifies to the vigor of this competition.[9]

IV. APPLICABLE LEGAL PRINCIPLES

Vanco believes that the economic reality of the market and the complete congruence in this case of the purposes of the Indiana non-importation law and the Robinson-Patman Act support the finding of Falls City's liability. Further, as a matter of public policy, Falls City should not be allowed to escape antitrust liability by using as a shield asserted illegality under state law, which illegality was the direct result of its own antitrust violation.

A. *The Economic Reality of the Market.* It is a fundamental premise of antitrust law that the relevant market is the geographical and economic framework in which the parties actually compete, not artificial or political boundaries. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 336 (1962); *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 362 (1970); *United States* v. *Connecticut National Bank,* 418 U.S. 656, 671 (1974). The courts have previously recognized the Evans-

[9] How much of Vanco's injury was caused by such legal competition is not before this Court. The point is merely that much of the Indiana-Kentucky competition was perfectly legal.

ville-Henderson area as a single market, even for a perishable commodity such as milk. *Dean Milk Co.* v. *FTC*, 395 F.2d 696 (7th Cir. 1968). The existence on the statute books of a law that was known to be unenforced did not affect the economic realities of this marketplace, and it would be inconsistent with this Court's longstanding interpretation of the antitrust laws to ignore that economic reality.

B. *The Consistency between the State and Federal laws.* In this case there is no conflict between the state nonimportation law and the Robinson-Patman Act. In fact, Falls City's violation of the Robinson-Patman Act induced the violation of state law. It was only because price discrimination by Falls City and other brewers resulted in Kentucky retail prices that were irresistibly lower than the Indiana prices that the illegal traffic developed in the first place. If Falls City and other brewers had complied with the Robinson-Patman Act, enforcement of the state law would have been unnecessary, since the motivation to violate it would not have existed. If, on the other hand, Indiana had enforced its nonimportation law effectively, the impact of Falls City's price discrimination would have been mitigated.[10] Whether, in that case, it would have been legal for Falls City to treat Evansville and Henderson as two different markets is academic, since the law was not enforced and Evansville-Henderson was in fact, as demonstrated by Vanco and known to Falls City, a single competitive retail beer market. Apparently in recognition of this fact, Falls City has never attempted to allege, even in answer to the questions posed at oral argument in this Court, that it was entitled to treat Evansville and Henderson as if they were two different markets merely because of the unenforced nonimportation law. The fact that Falls City did not even consider the statute in its pricing decision is the ultimate proof of lack of

[10] The question of whether that price discrimination would nevertheless have violated the Robinson-Patman Act because of the remaining competition between on-premises retailers is not, of course, presented by this case.

conflict between the nonimportation law and the Robinson-Patman Act. This case therefore presents no conflict between the state law and the Robinson-Patman Act.

C. *Public Policy Considerations Support Vanco.* Vanco and its retailers neither caused nor profited from the competition in interstate beer sales. That competition was the direct result of the price discrimination engaged in by Falls City and other brewers, which benefited them by allowing them to reap artificially high prices in Indiana. That competition also benefited Falls City's Kentucky wholesalers and retailers, who were quick to capitalize on the situation by advertising their lower prices in Indiana newspapers and over Indiana radio broadcasts.[11] For the largest Henderson, Kentucky beer retailer to advertise itself as the "largest in the Tri-State area"[12] was certainly an attempt to cultivate cross-over consumer purchases.

In other contexts, this Court has refused to allow antitrust defendants to shelter behind their purported attempts to comply with state law or state policies, even when the antitrust violations assertedly furthered federal and state's goals. *National Gerimedical Hospital* v. *Blue Cross,* 452 U.S. 378 (1981); *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457 (1941). Here, where the antitrust violation actually caused the unenforced state law to be violated, the public policy considerations weigh heavily in favor of Vanco.

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[11] See Vanco's Brief in Chief, at 9.

[12] *Id.,* n. 14.

V. CONCLUSION

For the foregoing reasons Vanco respectfully urges the Court that the transportation home by Indiana consumers of beer purchased from Kentucky retailers, and Falls City's involvement in that trade, is a factor supporting Falls City's liability.

Respectfully submitted,

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WILLIAM D. ADLER
COUNSEL

January 18, 1980

The Honorable Cale J. Holder
United States District Court
Southern District of Indiana
United States Court House
Indianapolis, Indiana 46204

Re: Vanco Beverage Inc. v.
Falls City Brewing Co.,
No. EV 76-170-C

Dear Judge Holder:

We have received the Response of Vanco Beverage, Inc. to Falls City's Brief in Support of its Amended Third Affirmative Defense to Count II of Plaintiff's Amended Complaint. Although Falls City is entitled to file a reply brief, we feel nothing more needs to be said about the 21st Amendment issue in this case. The parties are in agreement that state laws given primacy by the 21st Amendment, preclude direct competition between Vanco and the Henderson, Kentucky distributor, Dawson Springs (Vanco Response, p. 6). The parties also agree that Vanco's claim of indirect injury based on alleged competitive effects at the retail level, are not controlled by the 21st Amendment or the state laws of Indiana and Kentucky. Instead, Vanco's claims of indirect injury depend upon issues of market definition, competitive impact, business injury to Vanco and computation of Robinson-Patman Act damages that have all been abundantly briefed.

While we, therefore, do not believe it necessary to file a reply to the Vanco Response, we would like to take this opportunity to call to the Court's attention the recent decision by the Court of Appeals for the Fifth Circuit in Chrysler Credit

Corp. v. J. Truett Payne, Inc., 1980-1 Trade Cas. ¶63,067 (5th Cir. 1979). In that case, the court reversed the denial of a directed verdict for defendant on the ground that plaintiff had failed to introduce the requisite substantial evidence of injury resulting from the alleged price discrimination. In rejecting evidence similar to that offered by Vanco here, the Court held: "Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient." [Id. at 77,307].

The Court in Chrysler Credit also aligned itself with the numerous other courts that have rejected the contention, made here by Vanco, that damages under Section 2(a) of the Robinson-Patman Act are determined merely by multiplying the amount of the price difference by the number of products sold. (See Vanco Post-Trial Brief at 18-19; Falls City Post-Trial Brief at 36-39; Falls City Reply at 31-33). The Court stated:

> Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one.
>
> * * *
>
> A price difference without more does not indicate the amount of lost sales or profits. [Id. at 77,308, 77,309].

On this ground, as well, the court held defendant was entitled to a directed verdict.

A copy of the Chrysler Credit opinion is enclosed for Your Honor's convenience.

Very truly yours,

Howard Adler

Howard Adler, Jr.

HA:wlm
Enclosure

√ cc: John T. Cusack, Esquire
James W. Bradford, Esquire

Opposition

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No. 81-1271

IN THE

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OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPPOSITION BY PETITIONER FALLS CITY INDUSTRIES, INC. TO MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

More than seven weeks after oral argument in this case, Respondent Vanco Beverage, Inc. ("Vanco") has moved to file a Supplemental Brief purportedly addressed to "a concern" that "some of the Justices indicated" regarding "the effect of the definition of the proper geographic market of an unenforced Indiana law . . . ." (Vanco's Motion, iii). Falls City hereby opposes that Motion.*/

Vanco's motion is extraordinary; it does not purport to come within any rule of the Supreme Court governing such filings; it is a naked plea for indulgence to expand the opportunity Vanco has had in pre-hearing briefs and at oral argument before this Court to argue in support of its position.

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*/ Vanco has filed an additional motion relating to its Supplemental Brief After Oral Argument, namely a Motion for Leave to File An Oversized Brief. Falls City will not respond separately to that motion.

Rule 35(5) of the Rules of the Supreme Court restricts supplemental briefs to the presentation by a party of "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief . . . ." Once a case has been called for hearing, such a brief may only be filed by leave of Court. (Rule 35(5) and (6); R. Stern and E. Gressman, Supreme Court Practice, 773-74 (5th ed. 1978)).

Respondent does not purport to come within the strictures of Rule 35(5). It does not intend to present "late authorities, newly enacted legislation, or other intervening matters" unavailable at the time of briefing. Rather, Vanco seeks another opportunity to argue an issue because it claims it "has not had an opportunity adequately to present its position." (Vanco's Motion, iii). Vanco, however, has already filed a seventy-page brief as well as a supplemental brief before oral argument. It does not now propose to present anything that was unavailable before the hearing. Accordingly, Falls City believes that the time for argument is at an end and that Vanco's motion should be denied.

If, however, the Court is disposed to grant Vanco's motion and permit a supplemental filing, then Falls City requests an opportunity to respond to Vanco's Supplemental Brief After Oral Argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 1982, I served copies of the foregoing Opposition by Petitioner Falls City Industries, Inc. to Motion By Respondent Vanco Beverage, Inc. For Leave to File Supplemental Brief After Oral Argument by first-class mail, postage pre-paid on John T. Cusack, Esquire, Gardner, Carton & Douglas, One First National Plaza, Suite 3300, Chicago, Illinois, 60603, and The Honorable Rex E. Lee, Solicitor General, United States Department of Justice, Washington, D.C., 20530.

Mary-Margaret Gillen

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Petitioner's Reply Brief

1

Supreme Court, U.S.
FILED
DEC 23 1982
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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

~~MOTION BY~~ PETITIONER FALLS CITY INDUSTRIES, INC. ~~FOR LEAVE TO FILE~~ REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

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IN THE

Supreme Court of the United States

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MOTION BY PETITIONER FALLS CITY INDUSTRIES, INC. FOR LEAVE TO FILE REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

Petitioner, Falls City Industries, Inc. ("Falls City"), respectfully moves the Court for leave to file Reply of Petitioner to Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc. ("Vanco").

The Court granted the Motion By Respondent Vanco Beverage, Inc. For Leave to File Supplemental Brief After Oral Argument on December 10, 1982, and on that date, accepted Vanco's Supplemental Brief After Oral Argument.

Falls City requests that the Court provide it the opportunity to respond briefly by granting leave to file the accompanying Reply of Petitioner to Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1271

FALLS CITY INDUSTRIES, INC.,
Petitioner,

v.

VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY OF PETITIONER TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

Vanco's post-argument supplemental brief,[1] filed more than six weeks after oral argument, does not purport to address the two principal issues briefed and argued in this case. It does not challenge Falls City's demonstration, fully supported by the government amici, that the lower courts' rulings are "inconsistent with the language and purpose of the Section 2(b) defense and . . . totally at odds with the broader purposes of the federal antitrust laws." (Amicus Br. 30). Nor, similarly, does it attempt

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[1] Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc. ("Post-Argument Br."). Falls City's main brief will be cited as "Falls City Br.", and the Brief for the United States as Amicus Curiae In Support of Reversal as "Amicus Br.".

to deal with Falls City's contention that the lower courts misapplied *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), in finding that the Indiana-Kentucky f.o.b. price difference caused injury to competition.

Instead, Vanco's belated post-argument brief exclusively addresses a "straw man" argument; namely, that Evansville and Henderson must be two separate retail beer markets because "an unenforced Indiana law prohibits a consumer from importing more than one quart of beer into Indiana." (Post-Argument Br. 1). In fact, it was never claimed that this consumer-level nonimportation law disposed of the market issue, although it is relevant along with other factors. (*See infra* at 3). There are, moreover, other state nonimportation laws that prohibit the sale of beer by out-of-state *wholesalers*, and thus play an even more pivotal role in defining the relevant geographic markets in the beer industry. Vanco's post-argument brief (1) is completely silent with respect to those laws; (2) disregards entirely undisputed evidence demonstrating that wholesale and retail beer prices in Evansville were different from and not correlated with beer prices in Henderson; and (3) erroneously (and irrelevantly) contends that Falls City's pricing "caused" consumers to violate the Indiana nonimportation law.

1. Vanco cites an Indiana statute that prohibits consumers from importing more than one quart of an alcoholic beverage without a permit (Ind. Code § 7.1-5-4-1, 7.1-5-11-1 (1976); Post-Argument Br. at 2 n.7), but fails to mention the Indiana and Kentucky laws that interdict competition from out-of-state wholesalers (Ind. Code § 7.1-3-3-5 (1979); Ky. Rev. Stat. § 243, 244 (1970)). The latter laws have resulted in the historic beer industry practice of charging different f.o.b. brewery prices to wholesalers in different states (*See* Falls City Br. 3-4), and have two immediate and direct effects on this case: *First*, they preclude *direct* competition between Vanco and the allegedly favored Kentucky wholesalers. As a

result, Vanco was forced to prove that Evansville and Henderson comprise a single *retail* beer market in which the f.o.b. brewery price difference indirectly caused competitive injury. As we have previously shown, it failed to sustain that burden. (Falls City Br. 21-32; Reply Brief for Petitioner 12-16). *Second*, the wholesale level nonimportation laws distinguish this case from *Dean Milk Co. v. FTC*, 395 F.2d 696, 701 (7th Cir. 1968), on which Vanco mistakenly relies. (Post-Argument Br. 12). In *Dean Milk*, there was no prohibition against cross-border selling, and local dairies were free to, and did, in fact, sell "in both cities."[2] Thus, it is simply untrue that Falls City has agreed that the geographic market issue "in this case does not depend upon any or all the state laws of Indiana and Kentucky." (Post-Hearing Br. 2, 4-5).[3]

2. Vanco argues at length that the fact that it is "technically illegal" for consumers to import beer into Indiana does not dispose of the market issue (Post-Argument Br. 2-9, 12). As noted, however, Falls City does not claim that Indiana's consumer-level nonimportation law *compels* a finding that Evansville and Henderson are separate retail beer markets. On the other hand, the illegality of transporting beer across state lines is relevant and, along with other economic factors, may explain why beer prices in Evansville are distinct from, and set without regard to, beer prices in Henderson. (*See* Falls City Br. 5-6, 24-26). Vanco completely ignores this undisputed and, we submit, dispositive pricing evidence.

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[2] There was no determination in *Dean Milk* that *consumers* moved across state lines to purchase milk at retail.

[3] Falls City's position is absolutely unchanged from that stated in its letter to Judge Holder of January 19, 1980. It has at all times relied on state laws that "preclude direct competition between Vanco and the Henderson, Kentucky, distributor, Dawson Springs," while agreeing that "Vanco's claim of indirect injury based on alleged competitive effects at the retail level, are not controlled by the . . . state laws of Indiana and Kentucky" (Post-Hearing Br. 4, and Appendix.)

Most significantly, Vanco's owner admitted that Vanco based its wholesale prices on the "established price" of the Evansville distributors of competitive brands,[4] and never adjusted its prices to meet Henderson price competition. (Tr. 722-23). As a result, Vanco's wholesale pricing was correlated in both timing and amount with that of competing Evansville wholesalers (DX 66, 86; *and see* DX 14, J. A. 82-85); there was no such correlation between Vanco's and Dawson Springs' wholesale prices. *Compare* DX 54 and DX 62, Pet. App. 59a-60a. Moreover, while Vanco cites the testimony of a Henderson retailer regarding *liquor* prices (Post-Argument Br. 6), it fails to point out that this same witness testified unequivocally that he did not consider Evansville prices in setting his *beer* prices (DX 215, pp. 10-11, Tr. 799-801, 815). In fact, there is no evidence that *any* wholesaler or retailer, in Evansville or Henderson, ever took cross-border beer prices into account in setting its own prices.

Under well-settled principles, the existence of different and uncorrelated price structures defeats Vanco's claim that there was a unitary Henderson-Evansville retail beer market. As Professors Areeda and Turner have stated, even where there are some "inter-area sales, separate markets are indicated for a given product where its price in separate areas differs and where price movements are relatively uncorrelated." II Areeda & Turner, *Antitrust Law* 355 (1978).[5]

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[4] He testified, in pertinent part, that "our prices to our customers are dependent upon our competition," that "when they settle at a price, and we find out what it is, then we generally go to whatever the established price is," and that his "competition" was the Evansville distributors of competing brands. (DX 66, pp. 85-87).

[5] It has been Falls City's position, concurred in by the government amici, that the lower courts erred as a matter of law in rejecting its meeting competition defense, and that accordingly, this Court could reverse on that ground without having to reach any factual questions. (Falls City Br. 10; Amicus Br. 9, 24; and see Dissent of Judge Swygert, Pet. App. 15a). While the market definition issue has some factual components, the underlying eco-

3. Vanco contends that Falls City "caused" the violation of the Indiana nonimportation law, and points to an episode in the summer of 1974 "when consumer importation of beer became so notorious that it was reported in the newspapers [and] several consumers were arrested by the Indiana excise tax police." (Post-Argument Br. 9). These contentions are at best marginally helpful to Vanco's straw man argument;[6] they do not even purport to advance Vanco's position on the two issues actually presented to this Court. In fact, the summer 1974 episode severely damages Vanco's position on the market definition and causation issues.

There was, undeniably, a flurry of cross-border beer sales in the summer of 1974, but it was not caused by Falls City's pricing. The undisputed evidence shows that in July 1974 Falls City increased its brewery prices by approximately the same amount to both its Indiana and Kentucky distributors (DX 54, DX 62, Pet. App. 59a, 60a); that Vanco increased *its* wholesale prices by more than the brewery increase while Dawson Springs deferred any increase in its wholesale price until September (Id.);[7] that for the one and only time during the

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nomic facts which demonstrate the absence of any pricing interdependence are not in dispute.

[6] Vanco charges Falls City with causing violations of the Indiana nonimportation law on the theory that "Falls City should not be allowed to escape antitrust liability by using as a shield asserted illegality under state law, which illegality was the direct result of its own antitrust violation. (Post-Argument Br. 11). As noted, however, Falls City has not relied upon the consumer level nonimportation law. Vanco presumably cites the summer 1974 incident to show that consumer arrests at that time were controversial and to support its argument that no further such arrests were made. (*Id.* at 9-10). The record is clear, however, that the severe wholesale price imbalance that arose in the summer of 1974 was not repeated thereafter. *Compare* DX 54 and 62, Pet. App. 59a and 60a.

[7] As a result, as we have previously noted, the difference between Vanco's and Dawson Springs' wholesale prices on certain major packages amounted to more than twice the f.o.b. price differential. (Falls City Br. 25 n.13). Moreover, as of July 1974, Dawson

relevant period there was aggressive price advertising by two Henderson beer retailers in the Evansville newspapers (Falls City Br. 25 n.14); and that the incident ended in September, without any concurrent change in the f.o.b. price differential. (Falls City Br. 24-26; DX 15, J. A. 186).

As noted, these undisputed facts severely undermine Vanco's position on the market and causation issues. *First*, if Henderson and Evansville were truly a single market, one would not expect Evansville prices to increase while Henderson prices stayed constant. Yet, a substantial difference persisted for a two-month period during which, concededly, Vanco made no adjustment in its prices. (Tr. 722-23). *Second*, Falls City cannot be said to have caused either the wholesale price imbalance or the low price advertising by two Henderson retailers. These intervening causes break the causal chain between Falls City's f.o.b. pricing and the claimed competitive injury.[8]

To sum up, Vanco's post-argument brief adds nothing to the briefs and oral arguments already presented to this Court. Falls City has never contended that the Indiana law prohibiting consumers from importing liquor controls the geographic market issue; and Vanco's supplemental brief does not address either the wholesale level nonimportation laws or the clear evidence that Indiana beer prices were different from, and not correlated with, beer prices in Kentucky.

For all of the reasons discussed above, as well as in the earlier briefs of Falls City and the government amici,

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Springs' gross profit margin on two major package types was $ .80 per case compared to $1.65 per case for Vanco. A year earlier their gross margins on the same packages had been approximately the same. *Compare* DX 54 and DX 62, Pet. App. 59a and 60a.

[8] As shown in Falls City's main brief, cross-over purchases in the Summer of 1974 had only a temporary and minimal effect. After 1974 Dawson Springs and Vanco lost Falls City sales at virtually the same rate. (Falls City Br. 25 n.15; DX 51, Pet. App. 54a).

we respectfully urge that the judgment of the Court of Appeals should be reversed and the complaint dismissed.

Respectfully submitted,

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December 23, 1982

Supplemental Respondent's Brief

2

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No. 81-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE INSTANTER THE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC. TO PRESENT LATE AUTHORITIES, AND SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

VANCO BEVERAGE, INC.,

Respondent.

MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE INSTANTER THE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC. TO PRESENT LATE AUTHORITIES

Respondent Vanco Beverage, Inc. ("Vanco") respectfully moves this Court for leave to file instanter its SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC. TO PRESENT LATE AUTHORITIES.

Recently, a decision was rendered by the United States District Court for The Western District of Pennsylvania in *Indian Coffee Corp.* v. *The Folger Coffee Co.,* 1982-3 Trade Cas. (CCH) ¶ 65,186 (Sept. 3, 1982), published February 14, 1983.

The *Indian Coffee* case involves allegations that the defendant's area-wide pricing policies constituted predatory price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The conduct at issue involved intense price competition, including market-wide price reductions by the defendant in a period of general price inflation. The defendant sought to justify its price discrimination as necessary to meet competition, under Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 2(b).

The issues discussed by the *Indian Coffee* court are relevant to some of the issues involved in this case, particularly to the proper interpretation of the meeting competition defense in the context of an area-wide price system. Vanco requests that this Court allow it an opportunity to bring these issues to this Court's attention by granting leave to file the instant supplemental brief.

Respectfully submitted,

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March 3, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,

Petitioner,

v.

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Respondent.

SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC. TO PRESENT LATE AUTHORITIES

This Brief is respectfully filed pursuant to Rule 35.5 of the Court to present to the Court the opinion in *Indian Coffee Corp.* v. *The Folger Coffee Co.*, 1982-3 Trade Cas. (CCH) ¶ 65,186 (W.D. Pa. Sept. 3, 1982). This opinion is a late authority, having been published in the February 14, 1983 issue of *Trade Regulation Reports* (CCH).

This case is significant for the following reasons:

(1) It states that for an area-wide price reduction to qualify for the meeting competition defense, the defendant must establish that the reduction was made in good faith as a matter of fact;

(2) It states that the manner in which the merchant meets competition is important in determining good faith as a matter of fact;

(3) It is illustrative of the difference between market-wide price reductions which are the natural result of competition in an *economic market area,* and selective price increases in an artificially defined market; and

(4) It is illustrative of genuine, intense price competition that gave rise to *price reductions* in a highly inflationary economic era, as opposed to the system of discriminatory *price increases* that took place in *Falls City* v. *Vanco*.

In *Indian Coffee* the plaintiff, a marketer of coffee products, brought an action against the defendant alleging predatory price discrimination under Section 2(a) of the Robinson-Patman Act. The defendant, Folger Coffee Co., filed an answer asserting, among other things, a good-faith-meeting-competition defense under Section 2(b) of the Robinson-Patman Act and, after the close of discovery, moved for summary judgment on its Section 2(b) defense.

The court denied Folger's motion for summary judgment on the ground that there was a material issue of fact as to whether the Section 2(b) defense should apply. The court found that there was evidence that Folger was beating, rather than merely meeting competition, and that there was evidence that Folger was the leader in initiating discriminatory price reductions to certain customers.

With regard to the showing necessary to support a meeting competition defense in the context of market wide price reductions, the *Indian Coffee* court stated:

> Although a § 2(b) defense is traditionally available for responses to individual competitive offers, the defense is not precluded per se where a defendant authorizes a blanket price reduction in a geographical area. *William Inglis* v. *ITT Continental Baking Co., supra* [668 F.2d 1014, 1045 (9th Cir. 1981)]. However, the defendant must establish that such a blanket reduction was made in good faith. The importance of the manner in which a merchant meets competition in determining that merchant's good faith is well-illustrated by the *Inglis* case. There the plaintiff, a local bread bakery, was caught in the cross fire of the price reductions of

> three national bakeries. Although the record in that case revealed that the defendant, one of the three national bakeries, *did not initiate* any of the major price reductions but was responding to price offers of other national bakeries, the court nevertheless concluded that the defendant's failure to offer price reductions on an individual basis or, in the alternative, to establish a system that would verify the need to institute marketwide reductions raised a question of fact for the jury as to the defendant's good faith efforts to meet competition. (1982-3 Trade Cas. (CCH) ¶ 65,186 at p. 71,733. Emphasis in original.)

Folger, like the defendants in the *Inglis* case, had an elaborate system of documentation to justify its market-wide price reductions under Section 2(b). Nevertheless, the court held that the issue of good faith was a fact question for the jury to decide. Unlike Folger, Falls City kept no contemporaneous documentation of the alleged competitive reasons for its lower Kentucky prices.[1]

Folger's blanket reductions throughout certain metropolitan areas show the inevitability of price competition throughout a natural market area once price reductions are initiated. They show the necessity of recognizing commercial realities. In *Falls City* v. *Vanco,* Falls City has sought to take advantage of a political, rather than an economic, boundary to justify its discriminatory price increases to Indiana distributors. This discrimination resulted in economic damage to Vanco and also in the frustration of Indiana's legitimate interest in controlling the importation of alcoholic beverages, because the resulting retail price differences tempted consumers to import lower priced beer from

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[1] At trial, Falls City referred to a price report covering only one point in time, late 1972, which was totally inadequate to support its defense for the entire 1972-1978 period, and an obvious attempt at post hoc justification. See Vanco's Brief-in-Chief at 50.

Kentucky.[2] Habitual consumer transportation of beer into Indiana results from the discriminatory prices of Falls City and other brewers. It will stop only when this Court enforces the Robinson-Patman Act, thereby harmonizing legitimate interests in and uses of a political boundary with the realities of a natural economic market.

Finally, the relevant period in the *Indian Coffee* case was 1971-1974, a period of such inflationary pressures that wage-price controls were implemented by the federal government. Despite such inflation, Folger and its competitors used an elaborate series of discounts and price and service promotions to achieve reductions in the "dead net" price to consumers (see pages 71,733-34 of the *Indian Coffee* opinion). The *Indian Coffee* case, like *Inglis,* shows that genuine competition can result in significant price decreases even in periods of intense inflationary pressure. It thus demonstrates the vacuousness of Falls City's attempt—which is entirely unsupported by evidence—to excuse its discriminatory price increases as compelled by inflationary pressures.

The facts in the *Indian Coffee* case show what real competition looks like. The rule of law from that opinion is that the availability of the meeting competition defense is quintessentially a question of the defendant's good faith. The application of that rule of law to *Falls City* v. *Vanco* requires affirmance of the district and appellate courts.

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[2] Indiana's importation law became impossible to enforce for two reasons: (1) the volume of the importation by consumers made it physically impossible, and (2) public opinion in Indiana was so strongly against enforcement that public prosecutors were discouraged from prosecution. See Vanco's Brief-in-Chief at 6 n.7.

For the foregoing reasons, and for the reasons discussed in the briefs previously filed by Vanco in this Court, the decision of the Court of Appeals should be affirmed.

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March 3, 1983

Opposition

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IN THE

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OCTOBER TERM, 1982

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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OPPOSITION BY PETITIONER FALLS CITY INDUSTRIES, INC. TO MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

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IN THE

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---

OPPOSITION BY PETITIONER FALLS CITY INDUSTRIES, INC. TO MOTION BY RESPONDENT VANCO BEVERAGE, INC. FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Invoking Rule 35.5 of the Rules of this Court, Respondent, Vanco Beverage, Inc. ("Vanco"), has moved for leave to file its second Supplemental Brief After Oral Argument.[1] Petitioner, Falls City Industries, Inc. (Falls

[1] Motion By Respondent Vanco Beverage, Inc. For Leave to File Instanter the Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc. to Present Late Authorities (hereinafter, Vanco Motion). If allowed, this would be Vanco's third

City), hereby opposes Vanco's motion on the ground that neither the purported new authority nor Vanco's supplemental brief would assist this Court in reaching a decision in this case.

Five months after oral argument, Vanco seeks leave to file a supplemental brief for the ostensible purpose of presenting "late authorities" to the Court (Vanco Motion 1). Since the late authority referred to by Vanco is merely a district court decision denying summary judgment,[2] we respectfully submit that the opinion and the proffered supplemental brief are being used by Vanco as a pretext to reargue its position on the merits. This conclusion is confirmed by the argumentative tone of the supplemental brief; by the fact that the decision *supports* the legal position urged by Falls City and the Government amici—namely, that Section 2(b)'s meeting competition defense *is* available to one who meets competition by a "blanket price reduction in a geographic area";[3] and by the fact that the district court held only that in light of sharply conflicting affidavits, there were genuine fact issues regarding defendant's need to adopt the disputed price reductions.[4]

For the foregoing reasons, Falls City respectfully submits that Vanco's motion constitutes an abuse of this Court's Rule 35.5 and urges that leave for Vanco to file

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supplemental brief. On October 6, 1982, just one week before oral argument was to be presented, Vanco filed a Supplemental Brief of Respondent Vanco Beverage, Inc., together with a twenty-seven page Supplemental Appendix. Subsequently, on December 3, 1982, its first Supplemental Brief After Oral Argument was filed with this Court.

[2] *Indian Coffee Corp. v. The Folger Coffee Co.*, 1982-3 Trade Cas. (CCH) ¶ 65,186 (W.D. Pa., Sept. 3, 1982).

[3] *Id.* at 71,733.

[4] *Id.* at 71,734.

a third supplemental brief should be denied. Should this Court grant Vanco's motion, Falls City requests an opportunity to file a brief response.

Respectfully submitted,

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Dated: March 15, 1983

Docket Sheet

No. 81-1271-CFX	TITLE Falls City Industries, Inc., Petitioner
See: 81-2136	v. Vanco Beverage, Inc.

DOCKETED	COURT
Jan. 7, 1982	United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Howard Adler, Jr.
	Counsel for Respondent: John T. Cusack
Dec. 18, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until January 7, 1982 by Stevens, J, on Dec. 22, 1981.
Jan. 7, 1982	Petition for writ of certiorari filed. (Record filed).
Feb. 5, 1982	Brief for the respondent in opposition filed.
Feb. 5, 1982	Brief for the U. S. as amicus curiae filed.
Feb. 10, 1982	DISTRIBUTED. 2-26.
Feb. 20, 1982	Reply brief of respondent to brief of the U. S. as amicus curiae filed. (D).
Feb. 22, 1982	Reply brief for the petitioner filed. (D).
Mar. 1, 1982	Petition for a writ of certiorari is GRANTED limited to Questions 1 and 2 presented by the petition.

Apr. 7, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until May 14, 1982.
May 13, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 13, 1982	Brief, amicus curiae, for the U. S. in support of reversal filed.
May 14, 1982	Joint appendix filed.
May 14, 1982	Brief for the petitioner filed.
May 24, 1982	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
June 8, 1982	Order extending time to file the respondent's brief on the merits until July 28, 1982.
uly 13, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Stevens, J., 7/16/82, not to exceed 70 pages.
uly 28, 1982	Brief for the respondent filed.
ug. 17, 1982	CIRCULATED.
ct. 5, 1982	Reply brief for the petitioner filed. (D).
ct. 6, 1982	Supplemental brief for the respondent filed. (D).

(Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 13, 1982	ARGUED.
)ec. 3, 1982	Motion by Respondent VANCO Beverage, Inc. for leave to file supplemental brief after oral argument and supplemental brief filed.
ec. 6, 1982	DISTRIBUTED. 12-10. (Above motion).
ec. 13, 1982	The motion of respondent for leave to file a supplemental brief after argument is GRANTED.
ec. 23, 1982	Reply brief of petitioner to motion by respondent VANCO Beverage, Inc. for leave to file supplemental brief after oral argument filed.
r. 3, 1983	Motion of respondent Vanco Beverage, Inc. for leave to file second supplemental brief after argument filed.
arch 11, 1983	REDISTRIBUTED. 3-18.
arch 15, 1983	Opposition by petitioner Falls City Industries, Inc. to motion by respondent Vanco Beverage, Inc. for leave to file supplemental brief after oral argument filed. (D).
ar. 21, 1983	The motion of respondent for leave to file second supplemental brief after argument is DENIED.
rch 22, 1983	Adjudged to be VACATED and REMANDED.
or. 21, 1983	Judgment issued.